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Attorneys for Defendant
 Deutsche Bank National Trust Company

UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF CALIFORNIA
 SACRAMENTO DIVISION

In re

JAMES L. MACKLIN,
 Debtor.

Case No. 10-44610

Chapter 7

DCN: JLM-1

JAMES L. MACKLIN,

Plaintiff,

v.

DEUTSCHE BANK NATIONAL
 TRUST CO., AS INDENTURE
 TRUSTEE FOR THE ACCREDITED
 MORTGAGE LOAN TRUST 2006-2
 ASSET-BACKED NOTES, et al.,

Defendants.

Adv. Pro. No. 11-02024-E

**DEUTSCHE BANK NATIONAL TRUST
 COMPANY EXHIBITS TO REQUEST FOR
 JUDICIAL NOTICE IN SUPPORT OF ITS
 OPPOSITION TO PLAINTIFF'S MOTION
 TO REOPEN ADVERSARY
 PROCEEDING**

**[Fed. R. Bankr. P. Rules 5010, 9024; Fed. R.
 Civ. P. Rule 60(b), (d)]**

Date: February 26, 2015
 Time: 1:30 p.m.
 Judge: Hon. Ronald Sargis
 Courtroom: 33

Exhibit	Description/Date
Exhibit A	Complaint filed by James Macklin in Placer County Superior Court, Case No. SCV26905 – 4/2/2010
Exhibit B	DBNT Notice of Removal of Action filed in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN - 5/3/10

Exhibit	Description/Date
Exhibit C	DBNT's Motion to Dismiss the Complaint filed in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN – 5/7/2010
Exhibit D	James Macklin's First Amended Complaint filed in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN – 6/4/2010
Exhibit E	DBNT's Answer filed in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN – 6/24/2010
Exhibit F	DBNT's Motion for Summary Judgment filed in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN - 8/20/10
Exhibit G	Order by Judge Kendall J. Newman entered in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN- 10/6/10
Exhibit H	James Macklin's Motion for Leave to File Second Amended Complaint and Proposed Second Amended Complaint filed in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN - 4/15/14
Exhibit I	Order by Judge Kendall J. Newman entered in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN - 7/1/14
Exhibit J	DBNT's Motion to Dismiss the Second Amended Complaint filed in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN - 7/21/14
Exhibit K	James Macklin's Opposition to DBNT's Motion to Dismiss filed in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN - 8/4/14
Exhibit L	DBNT's Reply on Motion to Dismiss the Second Amended Complaint filed in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN - 8/14/14
Exhibit M	Findings and Recommendations by Judge Kendall J. Newman entered in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN -9/8/14
Exhibit N	James Macklin's Objection to Magistrate Newman's Findings and Recommendations filed in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN - 9/22/14
Exhibit O	Order by Chief Judge Morrison C. England, Jr. adopting Magistrate Newman's Findings and Recommendations on December 29, 2014 in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN - 12/29/14
Exhibit P	Judgment entered in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN - 1/14/15
Exhibit Q	James Macklin's Rule 60 Motion filed in United States District Court, Eastern District of California, Case No. 10-cv-01097 MCE-KJN - 1/22/15

Dated: February 12, 2015

CARR McCLELLAN P.C.

By: /s/ Robert A. Bleicher

Robert A. Bleicher
Attorneys for Defendant
Deutsche Bank National Trust Company.

EXHIBIT A

EXHIBIT A

James L. Macklin, *pro per*
 10040 Wise Rd.
 Auburn, Calif., 95603
 916-798-0857
 jimmacklin@sbcglobal.net

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF PLACER

James L. Macklin, <i>pro se</i>	) Case no:___
Plaintiff,	) <u>COMPLAINT (VERIFIED)</u> AND
Vs.	) PETITION FOR TEMPORARY
Matthew Hollingsworth, and/or his	) RESTRAINING ORDER TO ESTOP
<i>successor, individually, and in his official</i>	) DEFENDANT FROM SELLING,
<i>capacity as C.E.O. OF SELECT</i>	) TRANSFERRING, FORECLOSING,
PORTFOLIO SERVICING, INC., an ens	) AND/OR OTHERWISE TAKING
<i>legis being used to conceal fraud,</i>	) PLAINTIFF'S REAL PROPERTY
LINDA FELLER, and/or her successor,	) FOR;
<i>individually and in her official capacity as</i>	) 1. DEFENDANT'S FRAUD; AND
C.F.O. OF SELECT PORTFOLIO	) 2. DEFENDANT'S USE OF A VOID
SERVICING, INC., an ens legis being	) CONTRACT PURSUANT TO
<i>used to conceal fraud,</i>	) AMERICAN JURISPRUDENCE
ROBERT J. JACKSON, AMY E.	) SECOND EDITION 46 § 203 AND
STARRETT, and/or his/her successor,	) 3. DEFENDANT'S NUMEROUS
<i>individually, and in his/her official capacity</i>	) VIOLATIONS OF CALIFORNIA LAWS;
<i>as ATTORNEY, AGENT OF</i>	) AND
DEUTSCHE BANK NATIONAL	) PLAINTIFF STATES THE CLAIM
TRUST CO., AS INDENTURE	) FOR WHICH RELIEF CAN BE
TRUSTEE, OR ITS' PREDECESSORS	) GRANTED PURSUANT TO:
OR ASSIGNS, an ens legis being used to	) F.R.Cv.P. RULE 12(b)(6)
<i>conceal fraud,</i>	) Judicial Notice of: Generally Accepted
R.K.ARNOLD and/or his successor,	) Accounting Principles (GAAP), Financial
<i>individually and in his official capacity as</i>	) Accounting Standards Board (FASB)
PRES./C.E.O. OF MORTGAGE	) Statements, FINRA, FDIC Compliance
ELECTRONIC REGISTRATION	) Regulations, Fed Rules of Evidence, 201
SYSTEMS, INC., as an ens legis being	) (Oral argument requested)
<i>used to conceal fraud,</i>	) Assigned to Honorable_____
AND DOES (Investors) 1-10,000,)
<i>et al,</i>)
Defendant.)

1 COMES NOW, James L. Macklin, *pro se*, Plaintiff, on COMPLAINT for
2 Defendant's numerous acts of fraud upon the court, inclusive of any and all judicial and/or
3 non-judicial proceedings, including without limitations, Defendant's purposeful fraud in
4 attempting to appear as **CREDITOR** to the court, when in fact Defendant is well aware
5 that they are not the **CREDITOR** and, therefore, **NOT the Real Party in interest** in the
6 foreclosure matter.

7 Plaintiff hereby reserves ALL RIGHTS, including without limitations, the Right to
8 join any and all other and/or new parties that Plaintiff may discover at any time during the
9 proceeding.

10 It is now incumbent on this court to query Defendant as to Defendant's lawful
11 position in this instant matter. If Defendants refuse to stipulate in open court that
12 Defendant is the **CREDITOR** in this instant matter, this court must remove Defendant
13 from this hearing forthwith, as this court is here to settle a matter between a **CREDITOR**
14 and a **DEBTOR**.

15 Accordingly, if Defendant is not the **CREDITOR** in this Matter, then Defendant
16 has thus stipulated that Plaintiff **MUST** be the **CREDITOR** in this matter.

17 Defendant cannot be the **CREDITOR** in this instant matter as Defendant **NEVER**
18 risked any assets, nor is Defendant holding any assets.

19 No entity can be a **CREDITOR** if they don't hold the asset in question, [*i.e.: the*
20 *NOTE and/or the property; and Mortgage Pass-through Trusts, i.e. R.E.M.I.C., as*
21 *defined in TITLE 26, Subtitle A, CHAPTER 1, Subchapter M, PART II, §§ 850-862]* and
22 cannot hold assets, for if they do, their tax exempt status is violated and the Trust itself is
23 void *ab initio*.

24 Defendant **MUST NOW** inform this court, the I.R.S. and the S.E.C. of their status
25 of either being a **CREDITOR** or not being a **CREDITOR**.

26 Defendant's own acts of fraud upon this court, Plaintiff, and the public in general
27 are the single cause of this paradox and absent Defendant "stating the claim" they are the
28 **CREDITOR** in this matter, this court cannot hear from Defendant.

1 By Law and precedent and in accordance with the Supreme Court of the United
2 States, *pro se* Pleadings MAY NOT be held to the same standard as a lawyer's and/or
3 attorney's; and whose motions, pleadings and all papers may ONLY be judged by their
4 function and never their form. *See*: Haines v. Kerner; Platsky v. CIA; Anastasoff v. United
5 States; Litigants are to be held to less stringent pleading standards;

6 *See*: Haines v. Kerner, 404 U.S. 519-421; In re Haines: pro se litigants are held to
7 less stringent pleading standards than admitted or licensed bar attorneys.
8 Regardless of the deficiencies in their pleadings, pro se litigants are entitled to the
9 opportunity to submit evidence in support of their claims.

10 *See also*: Platsky v. C.I.A., 953 f.2d. 25; In re Platsky: court errs if court dismisses
11 the pro se litigant without instruction of how pleadings are deficient and how to
12 repair pleadings.

13 *See also*: Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000); In re
14 Anastasoff: litigants' constitutional (guaranteed) rights are violated when courts
15 depart from precedent where parties are similarly situated.

16 For this matter, Defendant is and/or may be: the listed Defendant, any and all
17 parties Defendant refuses to reveal to Plaintiff and/or this Court, irrespective of
18 whether or not said party and/or parties are known to this Court and/or Plaintiff
19 and/or Defendant, the Corporate *ens legis* entity Defendant is employed by and/or is
20 an officer thereof, and/or any other party and/or parties, indispensable or not, any
21 and all other party and/or parties receiving any pecuniary gain from, through,
22 and/or by Defendant's fraudulent act(s). Singular may be inclusive of plural and
23 plural may be inclusive of singular.

24 Plaintiff hereby questions and refutes the authenticity of ALL dates and/or
25 ALL signatures by ALL parties on ALL documents, including without limitations,
26 notarized documents, "contracts", "deeds", "titles", affidavits, applications,
27 transmittals and/or the like, including without limitations the dates and/or signatures
28 by notary publics, officers, employees, and any and ALL parties attesting to any and

1 ALL claims, facts, accounting, transfers, recordings, publications, and/or the like,
2 etc.

3 Plaintiff disavows any and ALL implied and/or conferred and/or inferred
4 "understanding" of "*legalese*" terms now and at the time of the "signing" of any and
5 ALL of the documents pertaining to this action.

6 Plaintiff disavows any and ALL presumptions made by this Court, Defendant,
7 and any and ALL other parties when said presumption may be detrimental to
8 Plaintiff's interest and/or case.

9 Plaintiff hereby demands ALL of Plaintiff's Rights be protected by this Court,
10 including without limitations, State and federal constitutionally protected Rights,
11 God given Rights, Civil Rights, Human Rights, Rights protected by Treaty(s), and/or
12 ALL privileges and/or immunities, and/or the like.

13 Plaintiff hereby demands that this Court refuse to commit, and act to prevent
14 Defendant from committing, any and ALL acts barratrous in nature.

15 Plaintiff hereby demands ALL applicable Rules of Court, Rules of Procedures,
16 Laws, and/or Statutes be adhered to without preference for any party.

17 Plaintiff makes this statement: "I sent Defendant a Qualified Written Request,
18 a Written Notice of Loan/Credit Dispute, and a Notice of Loan Rescission, and
19 Defendant did not respond which was Defendant's confession they knew they were
20 committing fraud against me because they knew they were not the CREDITOR. If
21 Defendant had responded then Defendant would have done so because they are the
22 CREDITOR, but since Defendant did not respond as required by law for a
23 CREDITOR to do, then Defendant has confessed Defendant is not the CREDITOR.
24 That is how I discovered Defendant committed fraud against me."

25 If Defendant attempts to fight this matter in court then Defendant knowingly,
26 intelligently, and willfully must come to court without "clean hands."

27 Plaintiff comes to this court with "clean hands" and as a civilian and a laymen
28 and attempts only to seek justice and equity in accordance with California law.

1 /
2 //
3 **I. Plaintiff hereby states the claim for which relief can be granted**
4 **pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) as follows:**

5 **PLAINTIFF'S CLAIMS:**

- 6 1. Plaintiff is the **CREDITOR** in this matter.
- 7 2. Defendant is the **DEBTOR** in this matter.
- 8 3. Defendant is a **Fictitious Payee**.
- 9 4. Defendant is not the **CREDITOR**, or a lawful **ASSIGNEE** of the
- 10 **CREDITOR**, in this instant matter.
- 11 6. Plaintiff is not the **DEBTOR** in this matter.
- 12 7. Defendant is not the **Real Party in Interest** in this instant matter.
- 13 8. Defendant did NOT put Defendant's assets at risk in this instant
- 14 matter and never loaned Plaintiff anything of substance.
- 15 9. Defendant secretly extended to Plaintiff his own credit.
- 16 10. Defendant purposely destroyed the **GENUINE ORIGINAL**
- 17 **PROMISSORY NOTE** to "securitize" the **NOTE**.
- 18 11. Defendant's use of "*legalese*" in the mortgage documents as a means
- 19 of converting Real Property from its true owner to Defendant is a
- 20 criminal act of "conversion through fraudulent means" and therefore
- 21 the mortgage documents are evidence of a criminal act and cannot be
- 22 used by this Court in this instant matter.
- 23 (*See: Black's Sixth; "Understand"*)
- 24 12. The United States has a primary mortgage Right and/or status on the
- 25 real property in question and such **CANNOT** be circumvented by
- 26 Defendant's fraudulent and unlawful mortgage.
- 27 13. Defendant has been paid in full for the "contract" in question.
- 28

- 1 14. Defendant will fail to join "all indispensable parties" as such joinder
2 would be prima facie evidence of Defendant's fraudulent act of
3 securitizing the "PROMISSORY NOTE."
- 4 15. All "investors" involved in the securitization of the "Promissory
5 Note" are indispensable parties to this action and MUST be joined by
6 Defendant in any rebuttal, response, reply, answer, and/or the like by
7 Defendant.
- 8 16. Defendant is using a corporate entity and/or TRUST in furtherance of
9 fraudulent acts.
- 10 17. Defendant has no immunity for Defendant's fraudulent acts.
- 11 18. Defendant is jointly and severally responsible for ALL of Plaintiff's
12 losses, cost fees, and/or damages; *including without limitations*,
13 emotional damages, punitive damages, inclusive of but not limited to:
14 alienation of affection from: spouse, boy and/or girl "friend", friends,
15 children, pets, co-worker(s), client(s), customer(s), and any and all
16 other parties effected directly and or indirectly and/or collaterally
17 even if caused by Plaintiff's inability to deal emotionally with the
18 financial issues; as said issues are and have been caused by
19 Defendant's fraudulent acts.
- 20 19. Defendant knowingly, intelligently, and willfully separated the
21 Deed of Trust and/or the mortgage from the Genuine Original
22 Promissory Note and from the allonge.

23 Defendant MUST rebut ANY and ALL ALLEGATIONS and/or CLAIMS with
24 specificity, quoting facts and laws; or Defendant thereby stipulates Defendant agree with
25 Plaintiff's ALLEGATIONS and/or CLAIMS; and Defendant forever forsake arguing
26 against Plaintiff's allegations and/or claims in any court. Merely denying Plaintiff's
27 allegations and/or claims are not sufficient to survive a Motion for Default and/or
28 Summary judgment against Defendant.

Pursuant to FED.R.Cv.P. Rule 8(d) and/or all allegations and/or claims made by
Plaintiff MUST be accepted as true by this Court unless said allegations and/or claims are
rebutted with a preponderance of the evidence by Defendant. Any and all such avowries

1 and/or averments presented by Defendant must be *et hoc paratus est verificare* and done
2 under penalty of perjury.

3
4 **RELIEF:**

- 5 1. Defendant return the **GENUINE ORIGINAL PROMISSORY**
6 **NOTE OR ITS" PROCEEDS** and ALL MONEY PAID [*by Plaintiff*
7 *to Defendants, with a full disclosure of accounting of such*] to Plaintiff
8 forthwith;
- 9 2. If Defendant is not able to return the **GENUINE ORIGINAL**
10 **PROMISSORY NOTE** to Plaintiff forthwith then Defendant is
11 therefore admitting to Defendant's unlawful attempt to convert real
12 property without cause and/or right.
- 13 3. Defendant present to Plaintiff and this Court an Affidavit stipulating
14 that Defendant has NO RIGHTS to the real property in question.
- 15 4. Defendant returns DEED and all other documents pertaining to
16 ownership of real property in question to Plaintiff.
- 17 5. If Defendant **does not** STATE THE CLAIM UNDER PENALTY OF
18 PERJURY that Defendant is the **CREDITOR** in this instant matter,
19 Defendant agrees to accept Judgment by Default in favor of Plaintiff.
- 20 6. If Defendant **does** STATE THE CLAIM UNDER PENALTY OF
21 PERJURY that Defendant is the **CREDITOR** in this instant matter,
22 Defendant agrees to deliver acknowledgement of such forthwith to
23 the S.E.C. and the I.R.S.

24 **II. Plaintiff has the Due Process Right as protected by, *inter alia*, the Fourteenth**
25 **Amendment of the federal Constitution to rely on the court adhering to, *inter alia*,**
26 **Fed.R.Cv.P., *inter alia*, and the federal and state Constitutions:**

27 Fed.R.Cv.P. Rule 1

28 These rules govern the procedure in the superior courts of California in all suits
of a civil nature whether cognizable as cases at law or in equity. They shall be
construed to secure the just, speedy, and inexpensive determination of every
action.

III. Plaintiff questions the jurisdiction of any and ALL non-judicial
proceedings known only to Plaintiff as an administrative procedure fraudulently
based on an invalid and unenforceable confession of judgment presumption in the
mortgage documents.

1 Once jurisdiction is questioned the court MUST dismiss the action. Plaintiff
2 hereby questions the jurisdiction of any and all non-judicial proceedings instigated by
3 Defendant in Defendant's unlawful attempt to confiscate Plaintiff's real property.

4 Fed.R.Cv.P. Rule 12(h)(3). Waiver or preservation of certain defenses

5 A party waives all defenses and objections which that party does not present either
6 by motion as hereinbefore provided, or, if that party has made no motion, in that
7 party's answer or reply, except;

8 **(3) Whenever it appears by suggestion of the parties or otherwise that the
9 court lacks jurisdiction of the subject matter, the court shall dismiss the
10 action.**

11 *(Emphasis added)*

12 *See: McCorkle v. First Pennsylvania Banking and Trust Co. (4th Cir. 1972) 459
13 F.2d 243, 244. "At any stage of a litigation, including the appellate, subject matter
14 jurisdiction may be questioned. By failing to do so, the parties cannot confer
15 jurisdiction by consent. If the court perceives the defect, it is obligated to raise the
16 issue sua sponte."*

17 *See also: McCready v. White, 417 F.3d Case 1:05-cv-04743; "Ensuring the
18 existence of subject-matter jurisdiction is the court's first duty in every lawsuit."*

19 Subject-matter jurisdiction is an issue that must be considered at any stage of the
20 litigation. See 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that
21 the district court lacks subject matter jurisdiction, the case shall be remanded."); *United
22 Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 946 (7th Cir. 2003); BEMI, L.L.C.
23 v. Anthropologie, Inc., 301 F.3d 548, 551 (7th Cir. 2002)* ("[S]ubject-matter jurisdiction . .
24 . may be questioned at any time until the litigation becomes final, and sometimes even
25 later."). Even if the defense of lack of subject-matter jurisdiction is overruled, stricken, or
26 excluded by the district court, it may be reasserted at any time in the action. *See: 5B
27 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350, at 132
28 (3d ed. 2004) (citing Fahnestock v. Reeder, 223 F. Supp. 2d 618, 621 (E.D. Pa. 2002)).*

Once questioned, the Defendant and/or the court MUST prove jurisdiction
BEFORE proceeding with a case. This requirement has not been abrogated nor does it
exclude non-judicial proceedings.

1 The non-judicial foreclosure procedure requires jurisdiction as does any matter,
2 judicial, administrative or otherwise. Defendant has attempted to circumvent jurisdiction
3 requirements by falsely claiming Defendant has met for the court the requisite elements of
4 jurisdiction, primarily that Defendant is the Real Party in Interest.

5 Defendant's claim to be the Real Party in Interest is false, fraudulent and unlawful.
6 Pursuant to, *inter alia*, Rule 17(a), Defendant must prove Defendant is the Real Party in
7 Interest, not just claim such.

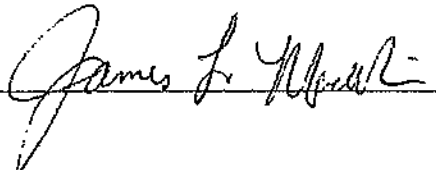
8 It is a functional impossibility for Defendant to be the Real Party in Interest without
9 the GENUINE ORIGINAL PROMISSORY NOTE. Ergo, it is a functional impossibility
10 for Defendant to prove Defendant is the Real Party in Interest without presenting to this
11 court the GENUINE ORIGINAL PROMISSORY NOTE.

12 It is an incontrovertible fact that Defendant is not in possession of the GENUINE
13 ORIGINAL PROMISSORY NOTE, and accordingly, it is an incontrovertible fact that
14 Defendant is committing fraud upon the court by falsely and/or fraudulently claiming
15 Defendant is in possession of the GENUINE ORIGINAL PROMISSORY NOTE.

16 Pursuant to law and in accordance with Plaintiff's claims; Defendants MUST
17 present to this court the GENUINE ORIGINAL PROMISSORY NOTE and prove to be
18 the **CREDITOR** in this agreement or agree to Plaintiff's demand for Judgment by Default
19 in favor of Plaintiff.

20 This COMPLAINT is supported by law which is incorporated by this
21 reference as if fully set forth, and which Plaintiff asks this Court to take judicial notice
22 thereof. This COMPLAINT is further supported by the accompanying Memorandum of
23 Points and Authorities.

24 RESPECTFULLY SUBMITTED: This 2nd day of April, 2010.

25
26
27 BY: , agent
28
9

James L. Macklin, *pro se*

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PROPERTY

This COMPLAINT is for the unlawful foreclosure proceeding initiated by Defendant concerning the real property located at:

10040 Wise Rd, township of Auburn, state of California, [95603].

Parcel No. 040-040-046. Accredited Home Lenders alleged loan No. 0603307230/0603307231.

Legal description: a portion of the East half of section 18, Township 12 North, Range 8 East, M.D.M., being also a portion of the tract of land shown and designated as Parcel "A", as shown on the map entitled, "Parcel Map No. 70586", filed for record December 14, 1973, in book 5 of Parcel Maps, pg. 16 ; except all minerals and all uranium, thorium, or any other material which is or may be determined to be peculiarly essential to the production of fissionable materials, whether or not of commercial value, as reserved in patent from the United States of America.

MEMORANDUM OF POINTS AND AUTHORITIES

Diversity of jurisdiction is present in this matter as the real property in question is in California and Defendant and/or other entities involved are in other states and/or countries. Therefore, Plaintiff hereby invokes Erie doctrine and will accordingly use California law and/or may use federal laws accordingly.

Defendants are committing BARRATRY by fraudulently filing documents only a CREDTIOR and the Real Party in Interest may file, when in fact Defendants are NOT the CREDTIOR and NOT the Real Party in Interest in this instant matter.

It is a functional impossibility for Plaintiff to "understand" the mortgage documents Defendants used in their unlawful attempt to convert Plaintiff's Real Property

1 to Defendants' possession. Plaintiff's inability to "understand" the "*legalese*" used by the
 2 attorneys who wrote the mortgage documents prohibits Defendants from using said
 3 documents as evidence against Plaintiff.

4 In fact, Defendants' *malum in se* act of using "*legalese*" in a document to
 5 unlawfully convert real property is defined in law as "theft through unlawful conversion."
 6 Defendants cannot now use said documents to convert said property without said
 7 documents being used as prima facie evidence of Defendants' felonious act.

8 **This court cannot use evidence of a felonious act to assist a criminal in**
 9 **furtherance of a felonious act.**

10 See: Black's Law Sixth Edition:

11 **Understand.** To know; to apprehend the meaning; to appreciate; as, to understand
 12 the nature and effect of an act. International-Great Northern R. Co. v. Pence, Tex.
 13 Civ.App., 113 S.W.2d 206, 210. To have a full and clear knowledge of; to
 14 comprehend. Thus, to invalidate a deed on the ground that the grantor did not
 15 understand the nature of the act, the grantor must be incapable of comprehending
 16 that the effect of the act would divest him of the title to the land set forth in the
 deed. As used in connection with the execution of wills and other instruments, the
 term includes the realization of the practical effects and consequences of the
 proposed act. See Capacity.

17 Definitions from Bouviers Law Dictionary 1856 Edition:

18 **BARRATRY**, crimes. In old law French barat, baraterie, signifying robbery,
 19 deceit, fraud. In modern usage it may be defined as the habitual moving, exciting,
 20 and maintaining suits and quarrels, either at law or otherwise. 1 Inst. 368; 1 Hawk.
 243.

21 2. A man cannot be indicted as a common barrator in respect of any number of
 false and groundless actions brought in his own right, nor for a single act in right of
 another; for that would not make him a common barrator.

22 3. Barratry, in this sense, is different from maintenance (q. v.) and champerty. (q.
 23 v.)

24 **CHAMPERTY**, crimes. A bargain with a plaintiff or defendant, *campum partire*,
 25 to divide the land or other matter sued for between them, if they prevail at law, the
 champertor undertaking to carry on the suit at his own expense. 1 Pick. 416; 1
 26 Ham. 132; 5 Monr. 416; 4 Litt. 117; 5 John. Ch. R. 44; 7 Port. R. 488. 2. This offence
 differs from maintenance, in this, that in the latter the person assisting the suitor
 27 receives no benefit, while in the former he receives one half, or other portion, of the
 thing sued for. See Punishment; Fine; Imprisonment; 4 Bl. Com. 135. 3. This was
 28

1 an offence in the civil law. Poth. Pand. lib. 3, t. 1; App. n. 1, tom. 3, p. 104; 15 Ves.
2 139; 7 Bligh's R. 369; S. C. 20 E. C. L. R. 165; 5 Moore & P. 193; 6 Carr. & P.
3 749; S.C. 25 E. C. L. R. 631; 1-Russ. Cr. 179 Hawk.P. C. b.1 c.84, s.5.
4 4. To maintain a defendant may be champerty. Hawk. P. C. b. 1, c. 84, s. 8 3 Ham.
5 541; 6 Monr. 392; 8 Yerg. 484; 8 John. 479; 1 John. Ch. R. 444;; 7 Wend. 152; 3
6 Cowen, 624; 6 Co@ven, 90

7 **I. Defendants are Not the Real Party in Interest in this and the non-judicial**
8 **proceeding as current possession of the GENUINE ORIGINAL**
9 **PROMISSORY NOTE is a requirement for a party to be the Real Party in**
10 **Interest in all proceedings pursuant to the U.C.C.**

11 Defendant is not and cannot be the Real Party in Interest and is committing fraud
12 by unlawfully attempting to foreclose on real property owned by Plaintiff. Absent
13 possession of the GENUINE ORIGINAL PROMISSORY NOTE signed by Plaintiff,
14 Defendant cannot lawfully move forward with the non-judicial process as the non-judicial
15 court authorities do NOT have subject matter jurisdiction.

16 **II. Absent prima facie evidence that Defendant is the Real Party in Interest in**
17 **this and the non-judicial proceeding, Defendant cannot be considered the**
18 **Real Party in Interest in this and/or the non-judicial proceeding.**

19 The ONLY acceptable evidence that Defendant may be the Real Party in Interest is
20 the GENUINE ORIGINAL PROMISSORY NOTE. Defendant did NOT present the
21 GENUINE ORIGINAL PROMISSORY NOTE to the officers acting in the non-judicial
22 procedure and therefore the non-judicial procedures claims to jurisdiction are and were
23 fraudulent claims and are thus void.

24 **III. Absent prima facie evidence that Defendant is the CREDITOR in this and the**
25 **non-judicial proceeding, Defendant cannot be considered the CREDITOR in**
26 **this and/or the non-judicial proceeding.**

27 The ONLY acceptable evidence that Defendant is the CREDITOR in this instant
28 matter is the GENUINE ORIGINAL PROMISSORY NOTE and the full accounting
showing the Defendant loaning the Plaintiff the Defendants' assets. Defendant did NOT
put assets at risk in this matter. Defendant did NOT present the GENUINE ORIGINAL
PROMISSORY NOTE and the complete, true and accurate accounting records to the

1 officers acting in the non-judicial procedure and therefore the non-judicial procedure
2 "claims to jurisdiction" are and were fraudulent claims and are thus void.

3 **IV. Since Defendant is not the Real Party in Interest in this and/or the non-**
4 **judicial proceeding, the foreclosure is an unlawful procedure.**

5 Defendant has and is committing fraud by attempting to foreclose on real property
6 Defendant is not the lawful lien holder of. Defendant is NOT the **CREDITOR** and NOT
7 a **GENUINE HOLDER IN DUE COURSE** of the **GENUINE ORIGINAL PROMISSORY**
8 **NOTE** and therefore **CANNOT** proceed non-judicially or judicially in any matter.

9 **V. Defendant received a COPY of the PROMISSORY NOTE AFTER the**
10 **PROMISSORY NOTE was determined to be in default.**

11 Defendant was fully informed the NOTE and/or mortgage was delinquent and in
12 dishonor before Defendant accepted a copy of the NOTE and/or became the **HOLDER** of
13 a **COPY** of the NOTE.

14 Even if Defendant did prove possession of the **GENUINE ORIGINAL**
15 **PROMISSORY NOTE**, which is impossible, Defendant's claims are still invalid as
16 Defendant has previously admitted knowledge the NOTE and/or mortgage was in default.

17 UCC §3-302 2(C). Holder in due course

18 A. Subject to subsection C of this section and section 3-106, subsection D, "holder
19 in due course" means the holder of an instrument if:

20 2. The holder took the instrument:

21 (c) **Without notice that the instrument is overdue or has been dishonored or**
22 **that there is an uncured default with respect to payment of another**
23 **instrument issued as part of the same series;**

24 UCC §3-305. Defenses and claims in recoupment

25 A. Except as stated in subsection B of this section, the right to enforce the
26 obligation of a party to pay an instrument is subject to the following:

27 1. A defense of the obligor based on:

28 (a) Infancy of the obligor to the extent it is a defense to a simple contract;

(b) Duress, lack of legal capacity or illegality of the transaction which, under
other law, nullifies the obligation of the obligor;

(c) Fraud that induced the obligor to sign the instrument with neither
knowledge nor reasonable opportunity to learn of its character or its essential
terms; or

(d) Discharge of the obligor in insolvency proceedings.

1
2 **VI. Defendant has knowingly, with malice aforethought, violated numerous,**
3 ***inter alia*, California Codes to convene the non-judicial proceeding and/or**
4 **attempt to unlawfully foreclose on Plaintiff's real property.**

5 Plaintiff hereby submits the following Code sections as an offer of proof of an
6 abridged list of the crimes perpetrated by Defendant in Defendant's fraudulent attempt to
7 unlawfully convert Plaintiff's real property into Defendant's asset. Key words are in **bold**
8 for the court's convenience.

9 Defendant's unlawful use of the non-judicial proceeding to fraudulently establish
10 "standing" without the GENUINE ORIGINAL PROMISSORY NOTE is prima facie
11 evidence of Defendant's guilt, and evidence of Defendant's violations of the statutes.

12 In fact, Defendant could not have convened the non-judicial procedure without
13 having violated one and possible all of the listed statutes, and probably other state and
14 federal laws.

15 Plaintiff presents the following list ONLY as evidence of the non-judicial
16 procedure's lack of jurisdiction and not as evidence of criminal activity on the part of
17 Defendant. Accordingly, Defendant cannot disavow said claims for Plaintiff's use of
18 criminal violations in civil litigation.

19 Presentment of false instrument for filing; classification

20 A person who acknowledges, certifies, notarizes, procures or offers to be filed,
21 registered or recorded in a public office in this state an instrument he knows to be
22 false or forged, which, if genuine, could be filed, registered or recorded under any
23 law of this state or the United States, or in compliance with established procedure is
24 guilty of a class 6 felony. As used in this section "instrument" includes a written
25 instrument as defined in section 13-2001.

26 Criminal simulation; classification

27 A. A person commits criminal simulation if, with intent to defraud, such person
28 makes, alters, or presents or offers, whether accepted or not, any object so that it
appears to have an antiquity, rarity, source, authorship or value that it does not in
fact possess.

B. Criminal simulation is a class 6 felony.

Obtaining a signature by deception; classification

1 A. A person commits obtaining a signature by deception if, with intent to defraud,
2 such person obtains the signature of another person to a written instrument by
3 knowingly misrepresenting or omitting any fact material to the instrument or
4 transaction.

4 Criminal impersonation; classification

5 A. A person commits criminal impersonation by:

6 2. Pretending to be a representative of some person or organization with the intent
7 to defraud; or

8 3. **Pretending to be, or assuming a false identity of,** an employee or a
9 representative of some person or organization with the intent to induce another
10 person to provide or allow access to property.

9 Trafficking in the identity of another person or entity; classification

10 A. A person commits **trafficking in the identity** of another person or entity if the
11 person knowingly **sells, transfers or transmits** any personal identifying
12 information or entity identifying information of another person or entity, including
13 a real or fictitious person or entity, without the consent of the other person or entity
14 for **any unlawful purpose or to cause loss** to the person or entity **whether or not**
15 **the other person or entity actually suffers any economic loss**, or allowing
16 another person to obtain or continue employment.

14 Defrauding secured creditors; definition; classification

15 A. A person commits defrauding secured creditors if the person knowingly
16 **destroys, removes, conceals, encumbers, converts, sells, obtains, transfers,**
17 **controls or otherwise deals** with property subject to a security interest with the
18 intent to hinder or prevent the enforcement of that interest.

18 Defrauding judgment creditors; classification

19 A. A person commits defrauding judgment creditors if such person secretes,
20 **assigns, conveys or otherwise disposes** of his property with the intent to defraud a
21 judgment creditor or to prevent that property from being subjected to payment of a
22 judgment.

21 Fraud in insolvency; classification

22 A. A person commits fraud in insolvency if, when proceedings have been or are
23 about to be instituted for the appointment of a trustee, receiver or other person
24 entitled to administer property for the benefit of **CREDITORS** or when any other
25 assignment, composition or liquidation for the benefit of **CREDITORS** has been or
26 is about to be made, such person:

26 2. **Knowingly falsifies any writing or record relating to the property; or**

27 3. **Knowingly misrepresents or refuses to disclose** to a receiver or other person
28 entitled to administer property for the benefit of **CREDITORS** the existence,
amount or location of the property or any other information which he could be
legally required to furnish to such administration; or

1 **4. Obtains any substantial part of or interest in the debtor's estate with intent**
2 **to defraud any CREDITOR.**

3 Possession of altered property; classification

4 A. A person who is a dealer in property and recklessly possesses property the
5 permanent identifying features of which, including serial numbers or labels, have
6 been removed or in **any fashion altered** is guilty of a class 6 felony.

7 Participating in or assisting a criminal syndicate; classification

8 A. A person commits participating in a criminal syndicate by:

- 9 1. Intentionally organizing, managing, directing, supervising or financing a
10 criminal syndicate with the intent to promote or further the criminal objectives of
11 the syndicate; or
12 3. Furnishing advice or direction in the conduct, financing or management of a
13 criminal syndicate's affairs with the intent to promote or further the criminal
14 objectives of a criminal syndicate; or
15 4. Intentionally promoting or furthering the criminal objectives of a criminal
16 syndicate by inducing or committing any act or omission by a public servant in
17 violation of his official duty; or

18 Fraudulent schemes and artifices; classification; definition

19 A. Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains
20 any benefit by means of false or fraudulent pretenses, representations, promises or
21 material omissions is guilty of a class 2 felony.

22 B. Reliance on the part of any person shall not be a necessary element of the
23 offense described in subsection A of this section.

24 Fraudulent schemes and practices; willful concealment; classification

25 A. Notwithstanding any provision of the law to the contrary, in any matter related
26 to the business conducted by any department or agency of this state or any political
27 subdivision thereof, any person who, pursuant to a scheme or artifice to defraud or
28 deceive, knowingly falsifies, conceals or covers up a material fact by any trick,
29 scheme or device or makes or uses any **false writing or document** knowing such
30 writing or document contains any false, fictitious or fraudulent statement or entry is
31 guilty of a class 5 felony.

32 B. For the purposes of this section, "agency" includes a public agency as defined
33 by section 38-502, paragraph 6.

34 Money laundering; classification; definitions

35 A. A person is guilty of money laundering in the first degree if the person does any
36 of the following:

- 37 1. Knowingly initiates, organizes, plans, finances, directs, manages, supervises or
38 is in the business of money laundering in violation of subsection B of this section.

1 B. A person is guilty of money laundering in the second degree if the person does
2 any of the following:

3 1. Acquires or maintains an interest in, transacts, transfers, transports, receives or
4 conceals the existence or nature of racketeering proceeds knowing or having reason
5 to know that they are the proceeds of an offense.

6 2. Makes property available to another by transaction, transportation or otherwise
7 knowing that it is intended to be used to facilitate racketeering.

8 3. Conducts a transaction knowing or having reason to know that the property
9 involved is the proceeds of an offense and with the intent to **conceal or disguise**
10 the nature, location, **source, ownership or control of the property** or the intent
11 to facilitate racketeering.

12 4. Intentionally or knowingly makes a false statement, misrepresentation or false
13 certification or makes a false entry or omits a material entry in any application,
14 financial statement, account record, customer receipt, report or other document that
15 is filed or required to be maintained or filed under title 6, chapter 12.

16 5. Intentionally or knowingly evades or attempts to evade any reporting
17 requirement under section 6-1241, whether by structuring transactions as described
18 in 31 Code of Federal Regulations part 103, by causing any financial institution,
19 money transmitter, trade or business to fail to file the report, by failing to file a
20 required report or record or by any other means.

21 6. Intentionally or knowingly provides any false information or fails to disclose
22 information that causes any licensee, authorized delegate, money transmitter, trade
23 or business to either:

24 (a) Fail to file any report or record that is required under section 6-1241.

25 (b) File such a report or record that contains a material omission or
26 misstatement of fact.

27 7. Intentionally or knowingly falsifies, conceals, covers up or misrepresents or
28 attempts to falsify, conceal, cover up or misrepresent the identity of any person in
connection with any transaction with a financial institution or money transmitter.

8 In connection with a transaction with a financial institution or money
transmitter, intentionally or knowingly makes, uses, offers or presents or attempts
to make, use, offer or present, whether accepted or not, a forged instrument, a
falsely altered or completed written instrument or a written instrument that contains
any materially false personal identifying information.

9 If the person is a money transmitter, a person engaged in a trade or business or
any employee of a money transmitter or a person engaged in a trade or business,
intentionally or knowingly accepts false personal identifying information from any
person or otherwise knowingly incorporates false personal identifying information
into any report or record that is required by section 6-1241.

10 Intentionally conducts, controls, manages, supervises, directs or owns all or
part of a money transmitting business for which a license is required by title 6,
chapter 12 unless the business is licensed pursuant to title 6, chapter 12 and
complies with the money transmitting business registration requirements under 31
United States Code section 5330.

1 C. A person is guilty of money laundering in the third degree if the person
2 intentionally or knowingly does any of the following:

- 3 1. In the course of any transaction transmitting money, confers or agrees to confer
4 anything of value on a money transmitter or any employee of a money transmitter
5 that is intended to influence or reward any person for failing to comply with any
6 requirement under title 6, chapter 12.
7 2. Engages in the business of receiving money for transmission or transmitting
8 money, as an employee or otherwise, and receives anything of value upon an
9 agreement or understanding that it is intended to influence or benefit the person for
10 failing to comply with any requirement under title 6, chapter 12.

11 D. In addition to any other criminal or civil remedy, if a person violates
12 subsection A or B of this section as part of a pattern of violations that involve a
13 total of one hundred thousand dollars or more in any twelve month period, the
14 person is subject to forfeiture of substitute assets in an amount that is three times
15 the amount that was involved in the pattern, including conduct that occurred before
16 and after the twelve month period.

17 E. Money laundering in the third degree is a class 6 felony. Money laundering in
18 the second degree is a class 3 felony. Money laundering in the first degree is a
19 class 2 felony.

20 Residential mortgage fraud; classification; definitions

21 A. A person commits residential mortgage fraud if, with the intent to defraud, the
22 person does any of the following:

- 23 1. Knowingly makes any deliberate **misstatement, misrepresentation** or material
24 omission during the mortgage lending process that is relied on by a mortgage
25 lender, **borrower** or other party to the mortgage lending process.
26 2. Knowingly **uses** or facilitates the use of any deliberate **misstatement,**
27 **misrepresentation** or material omission during the mortgage lending process that
28 is relied on by a mortgage lender, **borrower** or other party to the mortgage lending
process.
3. Receives any proceeds or other monies in connection with a residential
mortgage loan that the person knows resulted from a violation of paragraph 1 or 2
of this subsection.
4. **Files or causes to be filed with the office of the county recorder of any
county of this state any residential mortgage loan document that the person
knows to contain a deliberate misstatement, misrepresentation or material
omission.**

B. An offense involving residential mortgage fraud shall not be based solely on
information that is lawfully disclosed under federal disclosure laws, regulations and
interpretations related to the mortgage lending process.

VII. Defendant CANNOT use the confession of judgment as written in the
mortgage for any proceeding, judicial, non-judicial, and/or otherwise.

1 California law requires the power of attorney for the confession of judgment to be
2 signed AFTER the indebtedness became due and payable. Therefore, any clause in the
3 mortgage pertaining to such is void and does not give Right and/or cause for Defendant to
4 claim confession of judgment authority and/or right.

5
6 Judgment by confession **shall not be entered upon a note**, bond or other
7 **instrument** in writing for the payment of money under the authority of a power of
8 attorney to confess judgment thereon, unless such authority is executed and
9 acknowledged on a day subsequent to the date on which the indebtedness to be
10 confessed became due and payable.

11 **VIII. Defendant cannot claim *res judicata* for standing from any decision in the**
12 **non-judicial proceeding as jurisdiction of the non-judicial proceeding is and**
13 **was in question, and therefore Defendant's standing remains in question.**

14 Whereas the non-judicial proceeding may only claim jurisdiction in accordance
15 with a valid confession of judgment and/or attorney's warrant, the fact neither the
16 confession of judgment nor the attorney's warrant were valid causes the non-judicial
17 proceeding to not have jurisdiction. Decision made in any proceeding that lack
18 jurisdiction are void.

19 Fraudulent statements in an affidavit invalidate said affidavit.

20 Failure of a confession of judgment to meet all five (5) elements required
21 invalidates said confession of judgment.

22 **IX. Defendant's use of a Notary Public who has a "beneficial interest" in the**
23 **process for the non-judicial proceeding is invalid.**

24 The Notary Public used by Defendant and/or Defendant's attorneys has a financial
25 and/or business interest with the Defendant and/or Defendant's attorneys and therefore
26 said Notary Public's actions are in violation of the, *inter alia*, Notary's Code of Ethics
27 and accordingly the Notary's verification is fraudulent and thus void.

28 CALIFORNIA NOTARY PUBLIC REFERENCE MANUAL, page 2
Second paragraph:

This means, a notary public cannot be a "party to the transaction" or a "party
to the instrument" and the notary public cannot have any financial or beneficial

1 interest in the transaction, no matter how small. A notary
2 public has a financial interest in a transaction if he or she will gain (or lose)
3 something of value in the transaction. A notary public has beneficial interest in
a transaction if the document will benefit the notary in some way.

4 Last paragraph:

5 "If a jurat is performed, the document signer is also required to vouch for the
6 truthfulness of the document."

7 Prohibited conduct; incomplete documents; signatures of relatives

8 B. A notary public is an impartial witness and shall not notarize the notary's
9 own signature or the signatures of any person who is related by marriage or
adoption.

10 **X. Plaintiff disputes ALL signatures by ALL other parties and demands**
11 **verification by prima facie evidence, affidavit, and non-hearsay testimony to**
validate ALL signatures.

12 There are numerous instances of Defendants Notary Public notarizing documents
13 with; incorrect dates; fraudulent signatures; attestations done absent parties being present;
14 perjurious statements of claims of being sworn; dates that do not correlate to events; etc.

15 ALL documents notarized MUST be correct or the whole process itself is void and
16 Defendant is required by law to prove the process is valid once questioned.

17 **XI. Plaintiff disputes ALL claims of service of process by Defendants in ALL**
18 **matters concerning the non-judicial foreclosure process**

19 To contest a cognovit clause on federal due-process grounds, a judgment debtor
20 must plead specific facts sufficient to support a claim that he or she did not voluntarily,
21 intelligently, and knowingly waive the right to prejudgment notice and hearing. *See:*
22 *F.D.I.C. v. Aaronian, 93 F.3d 636 (9th Cir. 1996).*

23 In some states, the practice of ex parte entry of judgment by confession is in
24 disrepute, and notice must be given to the debtor before entry of judgment. *See: First*
25 *Mut. Corp. v. Grammercy & Maine, Inc., 176 N.J. Super. 428, 423 A.2d 680 (Law*
26 *Div.1980).*

27 A state statute may provide that a judgment by confession may not be entered as a
28 final judgment, effective in all respects as a judgment after trial, until the prothonotary

1 gives written notice to the obligor by certified mail, return receipt requested, of an
2 opportunity for judicial determination as to whether the obligor understandingly waived
3 the right to notice and an opportunity to be heard prior to the entry of final judgment.
4 *See: Cheidem Corp. v. Farmer, 449 A.2d 1061 (Del. Super. Ct. 1982).*

5 Any errors in the service of process is considered by law a "fatal error" and the
6 whole process is then considered void. Absent fully correct process of service Defendant
7 has no authority to proceed with a foreclosure on any party and/or property.

8 Defendant is then required by law to cease and desist with said foreclosure process
9 and may only begin again once if and only if Plaintiff's claims are proved invalid.

10 **XII. Plaintiff disputes ALL claims by Defendant that there is ANY amount due**
11 **on the mortgage in question as said mortgage has been paid in full,**
12 **directly and/or indirectly, by one or more of the following: Credit Default**
13 **Swaps, "bailout funds", mortgage insurance, loan loss insurance,**
14 **government agencies, signature of party, etc.**

15 **XIII. Defendant did receive "bail out" and/or "TARP" funds from the government**
16 **and/or private quasi-government institutions that did in fact "pay-off" some or**
17 **all of Defendant's "mortgages" and/or other financial deals.**

18 It is incumbent on Defendant to prove the mortgage in question WAS NOT paid-
19 off and/or Defendant was enumerated directly and/or indirectly for the mortgage in
20 question.

21 In fact, absent prima facie evidence controverting Plaintiff's claim that Defendant
22 was reimbursed in some way by some entity for the mortgage in question, Defendant is
23 agreeing that said mortgage is paid in full.

24 Defendant MUST therefore present for inspection to the Plaintiff a complete list
25 with accounting of ALL funds received correlated to ALL mortgages paid and not paid
26 before continuing with any foreclosure attempt on the property and/or mortgage in
27 question.

28 Defendant's failure to produce for inspection said accounting documents is
Defendant's agreement that the mortgage in question is paid in full. There is no law
dictating who is required to pay for a mortgage for it to be considered paid in full.

1 In fact, Plaintiff believes the mortgage was and is paid in full and Defendant is
2 attempting to fraudulently convert real property through a conspiracy involving numerous
3 parties unknown to Plaintiff.

4 Therefore the forensic accounting of the original 'loan' should be submitted for
5 inspection, to reveal the true source of the funding of the 'loan'

6 **XIII. Plaintiff disputes and hereby rebuts any and all statements in any and all**
7 **Affidavits submitted by Defendant and/or Defendant's agents**

8 Confession of judgment without issuance or service of process

9 A. A party may appear in person or by an agent or attorney before a justice
10 of the peace without issuance or service of process and confess judgment
11 for an amount within the jurisdiction of the justice of the peace, and such
12 judgment shall be entered thereon upon the filing by Plaintiff, his agent or
13 attorney of an affidavit of the justness of Plaintiff's claim.

14 B. Where the judgment is confessed by an agent or attorney, the warrant of
15 agent or attorney authorizing the confession shall be filed with the justice
16 and noted in the docket.

17 **XIV. Legal definitions laymen may not be presumed to know and/or understand.**

18 Definitions a "laymen" would not likely understand and would require a BAR
19 licensed attorney to define and explain before a "laymen" may be considered "knowingly,
20 understanding, and willfully" agreeing to numerous legal definitions that ONLY
21 competent counsel would be familiar with. Absent Defendant proving Plaintiff had
22 knowledge of the following terms, Defendant cannot lawfully claim Plaintiff knowingly,
23 intelligently, and willfully agreed to any mortgage containing said terms and/or concepts.

24 **Black's Law Dictionary 6th Edition:**

25 *Cognovit judgment.* See Cognovit judgment; also, Confession Of judgment, below.

26 *Confession of judgment.* At common law, judgment entered where Defendant, instead of
27 entering plea, confessed action, or withdrew plea and confessed action.
28 Judgment where a Defendant gives the Plaintiff a cognovit or written confession of the
action by virtue of which the Plaintiff enters judgment. The act of a debtor in permitting
judgment to be entered against him by his creditor, for a stipulated sum, by a written
statement to that effect or by warrant of attorney, without the institution of legal
proceedings of any kind; voluntary submission to court's jurisdiction. O'Hara v. Manley,

1 140 Pa.Super. 39, 12 A.2d 820, 822. Such agreements for confession of judgment are void
2 in many states; e.g. Mass.G.L. c. 231, § 13A.

3 The negotiability of an instrument is not affected by a term authorizing a confession of
4 judgment if the instrument is not paid when due. U.C.C. § 3-112. *See also* Cognovit
5 judgment.

6 **Cognovit judgment.** Confession of judgment by debtor. Written authority of debtor and
7 his direction for entry of judgment against him in the event he shall default in payment.
8 Such provision in a debt instrument or agreement permits the creditor or his attorney on
9 default to appear in court and confers judgment against the debtor. Such agreements are
10 prohibited, or greatly restricted, in many states; though, where permitted, the
11 constitutionality of such has been upheld. *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S.
12 174, 92 S.Ct. 775, 31 L.Ed.2d 124. *See* Cognovit note; Judgment (*Confession of*
13 *judgment*).

14 **Cognovit note.** An extraordinary note which authorizes an attorney to confess judgment
15 against person or persons signing it. It is written authority of a debtor and a direction by
16 him for entry of a judgment against him if obligation set forth in note is not paid when
17 due. Such judgment may be taken by any person holding the note, which cuts off every
18 defense which maker of note may otherwise have and it likewise cuts off all rights of
19 appeal from any judgment taken on it. *Jones v. John Hancock Mut. Life Ins. Co.*,
20 D.C.Mich., 289 F.Supp. 930, 935. *See* Cognovit judgment; Judgment (*Confession of*
21 *judgment*).

22 **Warrant of attorney.** An instrument in writing, addressed to one or more attorneys
23 therein named, authorizing them, generally, to appear in any court, or in some specified
24 court, on behalf of the person giving it, and to confess judgment in favor of some
25 particular person therein named, in an action of debt. It usually contains a stipulation not
26 to bring any action, or any writ of error, or file a bill in equity, so as to delay him; such
27 writing usually being given as security for obligation on which judgment was authorized,
28 and in such procedure service of process is not essential. *See* Judgment (*Confession of*
Judgment).

Seisin. Possession of real property under claim of freehold estate. The completion of the
feudal investiture, by which the tenant was admitted into the feud, and performed the
rights of homage and fealty. Possession with an intent on the part of him who holds it to
claim a freehold interest. Right to immediate possession according to the nature of the
estate. *Williams v. Swango*, 365 Ill. 549, 7 N.E.2d 306, 309.

Actual seisin. Possession of the freehold by the pedis positio of one's self or one's tenant
or agent, or by construction of law, as in the case of a state grant or a conveyance under
the statutes of uses, or (probably) of grant or devise where there is no actual adverse
possession; it means actual possession as distinguished from constructive possession or
possession in law.

1 **Constructive seisin.** Seisin in law where there is no seisin in fact; as where the state
2 issues a patent to a person who never takes any sort of possession of the lands granted, he
3 has constructive seisin of all the land in his grant, though another person is at the time in
actual possession.

4 **Equitable seisin.** A seisin which is analogous to legal seisin; that is, seisin of an equitable
5 estate in land. Thus a mortgagor is said to have equitable seisin of the land by receipt of
the rents.

6 **Seisin in deed.** Actual possession of the freehold; the same as actual seisin or seisin in
7 fact. Roetzel v. Beal, 196 Ark. 5, 116 S.W.2d 591, 593.

8 **Seisin in law.** A right of immediate possession according to the nature of the estate. As
9 the old doctrine of corporeal investiture is no longer in force, the delivery of a deed gives
10 seisin in law.

11 **Seized.** A person is "seized" within Fourth Amendment when police officer restrains
12 person's freedom to walk away. State v. Ochoa, 112 Ariz. 582, 544 P.2d 1097, 1099. It
13 exists when reasonable person would feel that he was not free to leave. U.S. v. Albert,
C.A.N.C., 816 F.2d 958, 960. See Seizure. The status of legally owning and possessing
real estate. See Seisin.

14 **Seizure.** The act of taking possession of property, e.g., for a violation of law or by virtue
15 of an execution of a judgment. Term implies a taking or removal of something from the
16 possession, actual or constructive, of another person or persons. Molinav. State, 53
17 Wis.2d 662, 193 N.W.2d 874, 877.

18 A "seizure" of property (under Fourth Amendment) occurs when there is some meaningful
19 interference with an individual's possessory interest in that property. U.S. v. Jacobsen,
U.S.Minn., 466 U.S. 109, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85.

20 **Parol.** A word; speech; hence, oral or verbal. Expressed or evidenced by speech only; as
21 opposed to be writing or by sealed instrument.

22 **Parol contract.** An oral contract as distinguished from a written or formal contract.

23 **Understand.** To know; to apprehend the meaning; to appreciate; as, to understand the
24 nature and effect of an act. International-Great Northern R. Co. v. Pence, Tex. Civ.App.,
113 S.W.2d 206, 210. To have a full and clear knowledge of; to comprehend. Thus, to
25 invalidate a deed on the ground that the grantor did not understand the nature of the act,
the grantor must be incapable of comprehending that the effect of the act would divest him
26 of the title to the land set forth in the deed. As used in connection with the execution of
27 wills and other instruments, the term includes the realization of the practical effects and
consequences of the proposed act. See Capacity.

1 **Capable.** Susceptible; competent; qualified; fitting; possessing legal power or capacity.
2 Able, fit or adapted for. *See* Capacity.

3 **Capacity.** Legal qualification (*i.e.* legal age), competency, power or fitness. Mental ability
4 to understand the nature and effects of one's *acts*.

5 **XV. Discussion of confession of judgment clause as it pertains to the mortgage in**
6 **question and the use of such in the non-judicial foreclosure of Plaintiff's Real**
7 **Property.**

8 Defendant is attempting to non-judicially foreclose on real property in accordance
9 with the presumption of the "confession of judgment" concept (hereafter cognovit clause)
10 in the mortgage/deed of trust (hereafter mortgage) is and was valid. It is a functional
11 impossibility for a cognovit clause to be valid in the State of California pursuant to *stare*
12 *decisis* applicable to mortgage document signing unless an attorney represented Plaintiff
13 throughout the negotiations of the mortgage.

14 Defendant is fully aware Plaintiff was NOT represented by a BAR licensed
15 attorney at any point during the mortgage and/or purchase process that lead to the
16 mortgage being agreed upon by either party. As such, the mortgage is void *ab initio*, not
17 just voidable, but void and in fact did never lawfully exist pursuant to California law.

18 It is now incumbent on Defendant and/or Defendant's attorney to claim as their
19 defense in this matter before proceeding with any other defense, that Plaintiff was not
20 required nor entitled to competent counsel during the mortgage negotiations and signing,
21 in contradiction to the *stare decisis* pertaining to cognovit clauses in any and all contracts
22 and/or mortgages.

23 Accordingly, Defendant must therefore establish an argument against law and set
24 new precedent in violation of, *inter alia*, Fed.R.Cv.P. Rule 11(a):

25 ".....it is well grounded in fact and is warranted by existing law or a good
26 faith argument for the extension, modification, or reversal of existing law;
27 and that it is not interposed for any improper purpose, such as to harass or to
28 cause unnecessary delay or needless increase in the cost of litigation."
(*Emphasis added*)

American Jurisprudence, Second Edition, Judgments

IV. Particular Kinds of Judgments, D. Judgment by Confession, 6. Practice and Procedure Topic Summary Correlation Table References

§ 230. Notice and hearing, West's Key Number Digest, Federal Civil Procedure 2396, West's Key Number Digest, Judgment 29 to 70

See: D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124

"A maker of a confession of judgment voluntarily, intelligently, and knowingly waives due-process rights it otherwise possesses to prejudgment notice and hearing, and does so with full awareness of the legal consequences, when:

(1) the cognovit does not involve unequal bargaining power or overreaching;

(2) the agreement is not a contract of adhesion;

(3) the cognovit provision is obtained for adequate consideration;

(4) the cognovit is a product of negotiations carried on by parties with the advice of competent counsel; and

(5) the maker, despite cognovit, is not defenseless under state law."

Plaintiff hereby claims all five (5) elements required for a cognovit clause to be valid in California have been purposely violated by Defendant to deprive Plaintiff of Plaintiff's Civil Rights under color of state law.

A single violation of any one element is all that is required to void the mortgage.

**Verified explanation of the five (5) elements of cognovit,
as they pertain to this instant matter, and as such,
prima facie evidence the five (5) elements of cognovit have not been met**

(1) Defendant had an unequal bargaining power and Defendant was overreaching by:

i) Plaintiff is a laymen and as such did not have the requisite knowledge to discover Defendant's numerous acts of concealment and/or fraud concerning the "legal definitions" of words and/or language used in the mortgage document;

ii) Defendant is familiar with the "legal definitions" of the words and/or language of the mortgage and purposely, with malicious intent, confused Plaintiff and misrepresented the meanings of numerous words and/or the functionality of the language in the mortgage document(s);

1 iii) Defendant was overreaching the potential of Plaintiff's "understanding" the
2 mortgage and the words and/or language used in the mortgage, as said, was obviously
3 designed and written in such a way to purposely confuse laymen;

4 (2) The mortgage is, without controversy, an adhesion contract as Defendant openly
5 refuses to allow ANY change to the mortgage documents.

6 *See: Cubic Corp. v. Marty*, 4 Dist. 185., C.A.3d. 438, 229 Cal. Rptr 828, 833;
7 *Standard Oil Co. of Calif. v. Perkins*, C.A.Or., 347, F.2d 379, 383 "Distinctive
8 feature of adhesion contract is that weaker party has no realistic choice as to its
9 terms."

10 (3) There can be no adequate consideration when nothing is given for something.

11 Defendant required Plaintiff to unknowingly give up Plaintiff's Right to Due Process yet
12 Defendant gave absolutely nothing in return for Plaintiff's Right.

13 Black's Sixth Edition, page 39: Such as is equal, or reasonably proportioned, to the
14 value for that which it is given.

15 *See: Nissen v. Miller*, 44 N.M. 487, 105 P.2d. 324, 326 "Equal to some given
16 occasion or work."

17 *See also: Town of Winchester v. Cox*, 129 Conn. 106, 26 A2.d 592, 597 "Such only
18 as puts injured party in as good condition as he would have been if injury if injury
19 had not been inflicted."

20 (4) "Competent counsel" as used when referring to contract negotiations in Arizona
21 CAN ONLY mean a BAR licensed attorney. Fed.R.Civ.P., *inter alia*, Rule 6 deals with
22 "duties of counsel" and accordingly ONLY references and applies to BAR licensed
23 attorneys. Defendant has no bases and no grounds to claim "competent counsel" can mean
24 anything other than a BAR licensed attorney. If, in fact and on the record, Defendant's
25 attorney even attempts to claim in this matter that "competent counsel" can mean
26 something other than a BAR licensed attorney then this court shall immediately report
27 Defendant to the CALIFORNIA BAR for his fraudulent effort and violation of his
28 contract with the CALIFORNIA BAR.

 The courts in Arizona have made numerous decisions relating to "competent
counsel" when referring to contracts and all of such state unequivocally that said counsel
MUST be, and may ONLY be, a licensed attorney.

The following issue is absolutely incontrovertible under California Law:

1 **ANY MORTGAGE THAT IS NOT A PRODUCT OF NEGOTIATIONS**
2 **CONDUCTED BY A COMPETENT BAR LICENSED ATTORNEYS IS**
3 **VOID *AB INITIO* AND CANNOT BE ENFORCED IN ANY JUDICIAL**
4 **AND/OR NON-JUDICIAL PROCEEDING IN CALIFORNIA.**

5 **In fact, if Defendant is not willing to claim for the record that Plaintiff was not**
6 **required to have advice of counsel for the mortgage in question to be valid, then**
7 **Defendant has agreed that the mortgage in question is void.**

8 **Also, in fact, if Defendant does agree that Plaintiff was required to have advice**
9 **of counsel for the mortgage to be valid, yet Defendant is well aware that Plaintiff did**
10 **not have advice of counsel, then Defendant is thereby confessing to the crime of**
11 **barratry if Defendant does not agree to a summary judgment in favor of Plaintiff.**
12 (5) Defendant's attempt at non-judicial foreclosure, and therefore his defense, is based
13 solely upon the claim that Plaintiff is defenseless under state law due to the "confession of
14 judgment" clause in the mortgage.

15 It is well established that court is adversarial in nature, yet contracts are agreements
16 between parties to prevent disputes. Accordingly, rules for specific contractual agreements
17 such as mortgages have been decided by precedent to prevent parties from using the court
18 to take advantage of weaker parties. The legality of a non-judicial foreclosure is not the
19 issue before this court. More correctly stated the requirement of "confession of judgment"
20 is the primary controversy this court must determine. The determination of the validity of
21 "confession of judgment" must rely on the *stare decisis* as previously stated.

22 Plaintiff hereby states and claims as an offer of proof in this matter, it is not
23 lawfully possible for this court to determine the mortgage in question is valid unless this
24 court determines that:

- 25 1. Defendant and Plaintiff had equal bargaining power and Defendant's requests in the
26 mortgage were not overreaching;
27 2. Plaintiff could have altered the terms and conditions of the mortgage and the Defendant
28 would have still consummated the deal;

1 3. Plaintiff was adequately compensated for his loss and that Plaintiff understood he was
2 voluntarily, knowingly, and intelligently agreeing to said loss;

3 4. Plaintiff was advised by a BAR licensed attorney through out the mortgage process;

4 5. Plaintiff has a defense against the cognovit clause based in law irrespective of
5 Defendant's claims.

6 6. Defendant has risked assets in the mortgage.

7 Absent a conclusion based in fact and California law that all five (5) elements of a
8 cognovit clause have been met, then this court may only determine that the mortgage in
9 question is VOID *ab initio* and that Plaintiff is the true lawful owner of the real property in
10 question.

11 **XVI. VERIFIED STATEMENTS OF FACTS AND**
12 **ALLEGATIONS BASED ON VERIFIED FACTS**

13 Plaintiff, avers that, prior to, during and up to a recent event, Plaintiff had no
14 knowledge whatsoever as to particular terms contained within the Deed of Trust, which,
15 Plaintiff learned much later, contained, *inter alia*, a small and somewhat hidden and/or
16 disguised provision, known as a Power of Sale Clause that, Plaintiff now finds Defendant
17 wanton to, individually and severally invoke, in order to literally confiscate Plaintiff's
18 property without due process.

19 Whereas, normally, at minimum, each page of an important (life-altering)
20 document, such as a Deed of Trust, would require initialing of the party executing it, as to
21 signify the obligor's acknowledgement thereof. Defendants furthered their concealment by
22 not only directing Plaintiff away from certain terms/clauses and the like, but are wholly
23 without evidence via initialing of these terms/clauses, that would have otherwise alerted
24 Plaintiff to the extent of what rights were truly being abrogated.

25 Plaintiff believes and therefore avers, that Defendants willfully and intentionally
26 concealed the aforesaid Clauses, and any irrevocability thereafter imparted to the sole
27 detriment of Plaintiff, including, but not limited to, the preclusion to commence any action
28 in defense of Plaintiff's rights, for the expressed purpose of depriving an otherwise

1 unknowing Plaintiff of fundamental rights to Due Process, by nothing less than despicable
2 and clearly unconscionable means.

3 Federal questions of constitutionality arise from the conduct and nature of
4 Defendants' actions, both individually and collectively, insofar as to the inherent rights
5 that may be otherwise enjoyed by Plaintiff, as insured under the Fifth and Fourteenth
6 Amendments to the United States Constitution; and, as to certain statutorily clothed
7 tetherings upon ones rights; particularly, a Power of Sale clause, and the irrevocable
8 means by which it attaches, in defiance of the Supremacy Clause of the United States
9 Constitution.

10 The Fourteenth Amendment to the United States Constitution reads, in pertinent
11 part, "All persons born or naturalized in the United States, and subject to the jurisdiction
12 thereof, are citizens of the United States and of the State wherein they reside. No State
13 shall make or enforce any law which shall abridge the privileges or immunities of citizens
14 of the United States; nor shall any State deprive any person of life, liberty, or property,
15 without due process of law; nor deny to any person within its jurisdiction the equal
16 protection of the laws."

17 Plaintiff states that Amendment V of the Constitution of the United States provides the
18 same answer being raised by the Plaintiff, that: **"No person shall be deprived of life,**
19 **liberty, or property without due process of law."** A similar provision exists in all the
20 state constitution; the phrases **"Due Course of Law"**, and the **"Law of the Land"** are
21 sometimes used; but all three of these phrases have the same meaning and that
22 **applies conformity with the ancient and customary laws of the English people or laws**
23 **indicated by parliament.** *Davidson v. New Orleans* 96 U.S. 97, 24, L Ed 616.

24 The Supremacy Clause of the United States Constitution, Article VI, paragraph 2,
25 mandates that State judges, regardless of state constitutional considerations, and laws
26 enacted to the contrary, by effectuating the united States Constitution and its amendments
27 as being the "supreme law of the land".
28

1 The Supremacy Clause reads in pertinent part, "This Constitution and the Laws of
2 the United States in Pursuance thereof; and all treaties made or which shall be made,
3 under the Authority of the United States, shall be the supreme Law of the Land; and the
4 Judges in every state shall be bound thereby, any Thing in the Constitution or the Laws of
5 any State to the contrary notwithstanding."

6 The Due Process Clause of the United States Constitution requires "timely
7 individual notice..., before their property can be adversely affected". See *Volkswagenwerk*
8 *Aktiengesellschaft v. Schlunk*, 486 U.S. 694,707 (1988)

9 Plaintiff was (unknowingly) deprived of Due Process (and other) rights, as
10 guaranteed under the Fourteenth Amendment of the United States Constitution and, the
11 California State Constitution; as, Defendants', in the first instance, through
12 unconscionable means, caused to be executed a certain Deed of Trust, which, unknown,
13 nor otherwise explained to Plaintiff, lacked the proper "Notice", having substituted in lieu
14 of, an obscure and/or as yet detected provision for the unfettered power of sale of
15 Plaintiff's property.

16 Notice is a Due Process issue, which in the absence thereof, constitutes the
17 abrogation of Plaintiff's substantive and procedural due process rights as afforded under
18 the Fifth (5th) and Fourteenth (14th) Amendments, guaranteed Plaintiff by the United
19 States Constitution.

20 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) ("An elemental
21 and fundamental requirement of due process in any proceeding which is to be accorded
22 finality is notice reasonably calculated, under all the circumstances, to apprise interested
23 parties of the pendency of the action and to afford them an opportunity to present their
24 objections.")

25 The Constitution of the United States and California makes it illegal for any one to
26 take property without just compensation and by this amendment (5th) there can be no
27 proceeding against life, liberty, or property which may result in the observance of those
28 general rules established in our system of Jurisprudence for the security of private rights

1 which guarantees to each citizen the equal protection of the laws and prohibits a denial
2 thereof by any Federal official." (*See rights*) *Bolling v. Sharpe*, 327 U.S. 497. *U.S. vs*
3 *Kuwzbzva (DC-CAL)* 56F Supp. 716.

4 The terms "due process of law" and "natural rights" as used in the Federal
5 Constitution and/or the Declaration of Independence, have been repeatedly declared to be
6 the exact equivalent of the phrase "law of the land" as used in the *Magna Charta*. 16 *Am.*
7 *Jur.* 2d 547;

8 Plaintiff hereby incorporates paragraphs one (1) through thirty-nine (39) of the
9 *Magna Carta* as if they are set forth at length herein.

10 Upon information and belief of Plaintiff, a power of sale clause, whether evidenced
11 or not, within a Deed of Trust, is akin in performance to a cognovit note and/or confession
12 of judgment, however, it operates far more insidiously; as, it specifically robs the
13 (unknowing) maker of certain or otherwise assured rights and remedies, including, but not
14 limited to Due Process, and redress by appeal, while wholly evading the requisite (form
15 and manner of) noticing as encumbering cognovits or confessions.

16 Upon information and belief of Plaintiff, the hidden power of sale clause, which in
17 effect, creates a cognovit note/confession of judgment, as irrevocably granted in a Deed of
18 Trust, does just that; it creates conditions that are in violation of the California
19 Constitution.

20 WHAT IS A COGNOVIT NOTE? A cognovit note is not an ordinary note. It is
21 indeed an extraordinary note, which authorizes an attorney to confess judgment against the
22 person or persons signing it. It is written authority of the debtor and a direction by them
23 for the entry of a judgment against debtor, if the obligation set forth in the note is not paid
24 when due.

25 Such a judgment (of confession) may be taken by any person or any company
26 holding the note, only if specifically and diligently pointed out and discussed as to the
27 legal ramifications in so doing, for it cuts off every defense which the maker of the note
28

1 might otherwise possess. It likewise cuts off all rights of appeal from any judgment taken
2 on it.

3 According to The United States Supreme Court, "a cognovit note is the ancient
4 legal device by which the debtor consents in advance to the holder's obtaining a judgment
5 without notice or hearing, and possibly even with the appearance, on the debtor's behalf,
6 of an attorney designated by the debtor".

7 Justice Blackmun, expressing the unanimous view of the court in *Overmyer v.*
8 *Frick*, 405 U.S. 174, 92 S.Ct. 775, L.Ed.2d 124 (1972), stated the criteria for establishing
9 constitutionality of a Cognovit Note is not determined upon the theory of the note **but the**
10 **method used by both parties to afford each other due process** protection afforded by
11 the Fourteenth Amendment. (*Emphasis added*)

12 Justice Blackmun stated, "...[i]t was held that (1) a cognovit clause was not, per
13 se, violative of the Fourteenth Amendment due process requirements as to prejudgment
14 notice and hearing, and (2) under the facts in the instant case, (*Overmyer*) due process was
15 not violated by the entry of the confessed judgment, since the record established that **the**
16 **debtor had knowingly and voluntarily waived its rights to notice and hearing, with**
17 **full awareness of the legal consequences, by executing the cognovit note, which was**
18 **supported by consideration from the creditor, and which had resulted from negotiations**
19 **between the parties of equal bargaining power,..."** *Id* (*Emphasis added*)

20 Justice Douglas, joined by Justice Marshall concurring, stated, in effect that, (1)
21 **the record must establish that a clear and unmistakable, voluntarily and intelligently**
22 **valid waiver of the debtor's constitutional rights, (2)...** a trial judge was required to
23 vacate a judgment obtained through a cognovit clause when presented sufficient evidence
24 of an affirmative defense to pose a jury question, a preponderance of evidence burden not
25 being imposed, and (3) the preponderance of the evidence in the (present) case does not
26 support even a conclusionary finding that Plaintiff was even aware of the existence of any
27 cognovit note, let alone intentionally, deliberately, knowingly and intelligently waive due
28 process rights.

1 Justice Douglas, further observed, "Debtors receive the benefit of credit at a lower
2 rate of interest than they would receive if they did not give the creditor the right to confess
3 judgment against them. Nevertheless, **the right to be heard in court is central to our**
4 **system of justice, and, as with other constitutional rights, there is no presumption of**
5 **waiver."** *Overmyer*, 405, U.S. 174, 31 L. 2d 124, 92S.Ct. 775 (1972) and its companion
6 case, *Swarb v. Lennox*, 405 U.S. 191, 31 L. ed.2d 138, 92 S.Ct. 767 (1972) and at 186,
7 188. *(Emphasis added)*

8 Based upon the Defendants' lack of credible evidence and/or proof that Plaintiff
9 ever waived or was ever advised of legal detriment upon the signing of what must be
10 characterized, at best, as a hidden cognovit clause, is just preposterous and is sufficient to
11 warrant presentation to a jury.

12 In order to help determine the validity of the cognovit note and/or confession of
13 judgment before this Court, one must concede that the mentioned contract containing the
14 hidden clause, was never explained to the Plaintiff, so Plaintiff was never aware of
15 waiving Fourteenth Amendment rights through a contract of adhesion (*illegal and/or void*
16 *contract*) or the product of disparity in the parties' bargaining power.

17 Most contracts of adhesion are either procedural and/or substantively
18 unconscionable and, the unconscionability alone should void the cognovit clause of this
19 adhesion contract.

20 Plaintiff is aware that in a civil proceeding, acquiescence in the loss of
21 fundamental rights will not be presumed, and, that the rights to due process in a civil
22 judgment are subject to waiver. Plaintiff emphatically states that the contract of adhesion
23 was a take it or leave it offer and the cognovit clause was never an issue raised with
24 emphasis, or even raised at all, by the Defendants during the signing ceremonies.

25 Based upon the Plaintiff's recent extensive study of cognovit notes for this
26 matter; (1) this contract was never open to any negotiations, for it was a contract of
27 adhesion, as the parties were not parties of equal bargaining power; (2) the Defendants
28 never gave the Plaintiff any extra consideration in order to obtain any confession of

1 judgment (cognovit note) clause, nor was the cognovit note issued under any other
2 substantial benefit and/or consideration including and not limited to a reduction in
3 installment payments or reduction in interest rates; (3) there was no contention or
4 acknowledgment that the Plaintiff was aware of the legal (detrimental) consequences of
5 the cognovit provision; (4) this Court should vacate this prejudgment (confession of
6 judgment or cognovit note) as a matter of law for showing that Plaintiff's natural Rights to
7 due process were violated.

8 The clear lack of evidence that Plaintiff ever intentionally, deliberately, and/or
9 knowingly waived due process rights is further supported by this very Complaint.

10 **Natural rights cannot be waived even if that is the intent of the Plaintiff.**

11 At all times material to this Complaint Plaintiff never waived Constitutional
12 rights to a trial by jury under any circumstances, much less willingly, knowingly, or
13 intentionally.

14 The United States Supreme Court and the great majority of State Supreme Courts
15 have all adopted the concept as; State's that use cognovit procedure was found
16 unconstitutional, unless, the debtor knowingly and understandingly consented to the
17 authorization to confess judgment.

18 *In National Equipment Rental, Ltd. v. Szukent, 375, U.S. 311 (1962), the Court*
19 *observed: "It is settled ...that parties to a contract may agree in advance to submit to the*
20 *jurisdiction of a given court, to permit notice to be served by the opposing party, or even*
21 *to waive notice altogether." Id., at 315-316.*

22 And, in *Boddie v. Connecticut*, supra, the Court acknowledges that "the hearing
23 required by due process is subject to waiver." 401 U.S., at 378-379. In another case on
24 point is from New Jersey when the Chief Justice described in a rather condescending tone,
25 "a cognovit note is the loosest way of binding a man's property that was devised in any
26 civilized country." *Alderman v. Diament, 7 N.J. L. 197, 198.*

1 The Supreme Court clarified another part of cognovit note when the Court stated,
2 "we do not presume acquiescence in the loss of fundamental rights, *Ohio Bell Tel., Co. v.*
3 *Public Utilities Comm'n*, 301 U.S. 292, 307 (1937), that standard was fully satisfied here."

4 The United States Supreme Court makes it very clear that any one may waive
5 their due process rights and/or any other right but in order to do so, one must intentionally,
6 knowingly, deliberately, and voluntarily do so.

7 The consequences or legal detriment to waiving one's Rights must be based only
8 upon an intelligent decision having been presented with the consequences of entering into
9 an agreement having a cognovit clause, (note and/or confession of judgment clause).

10 Because a cognovit note deprives the debtor knowledge and of notice that their
11 property is being seized, without recourse, or, without benefit of hearing or appeal, courts
12 demand "**clear and convincing evidence**" that the written waiver is "**voluntary,**
13 **knowing, and intelligently made.**" The question of waiver is factual not presumptive.
14 This, a jury must decide.

15 The Plaintiff is now schooled in the confession of judgment theory through
16 Defendants' application of a hidden within, cognovit note, and, agrees that the knowing
17 and voluntary waiver of one's due process Rights would be pertinent, if, it was truly
18 evident in the present case. Plaintiff agrees that the due process rights to notice and
19 hearing prior to a civil judgment are subject to waiver.

20 Because the cognovit note deprives the debtor of notice that their property is
21 about to be seized, without benefit of hearing, or right to appeal,, courts demand "clear
22 and convincing evidence" that the written waiver was "voluntary, knowing, and
23 intelligently made."

24 In order for the Defendants to substantially support their position that Plaintiff did
25 voluntarily waive due process rights, Plaintiff states that there was never any warning
26 paragraph, bold letters, bold sentences and/or no warning statement to merit any concern
27 on behalf of the Plaintiff. One would think to guarantee this basic constitutional question,
28

1 which is now before this court, the Defendants should have a warning such as the
2 following warning to serve as an example:

3 **"WARNING -By signing this paper you give up your right**
4 **to notice and court trial. If you do not pay on time a court**
5 **judgment may be taken against you without your knowledge**
6 **and the powers of a court can be used to collect from you or**
7 **your employer regardless of any claims you may have against**
8 **the creditor whether for returned goods, faulty goods, failure**
9 **on their part to comply with the agreement, or any other cause."**

10 Plaintiff once again reiterates that Plaintiff was never made aware of any cognovit
11 note and/or confession of judgment at the time of their entering into the contract with the
12 Defendants, or that, Plaintiff ever knowingly waived any Constitutionally guaranteed
13 Rights. Defendants never spent any time on this subject with Plaintiff.

14 After carefully examining the executed documents Plaintiff still cannot find any
15 specific references that Plaintiff has, in any way, waived any Constitutionally guaranteed
16 Rights upon execution of Defendants' documents.

17 Based upon further review, the Plaintiff never witnessed and/or was never
18 verbally instructed, concerning the loss of Due Process Rights. Any one may give up their
19 Rights, but, only those specifically bargained for.

20 Further, Plaintiff never knowingly, intelligently, and voluntarily waived Rights to
21 notice and hearing, and, was wholly unaware of the legal consequences appertaining
22 thereto.

23 Other factors that this Court must take into consideration, besides the
24 unconstitutionality of the purposefully disguised confession of judgment, and/or the
25 cognovit note incognito; but also must consider contracts of adhesions are procedurally
26 and substantively unconscionable contracts and contract foundations built upon mistakes,
27 inadvertence, excusable negligence, newly discovered information, fraudulent
28 conveyance, misrepresentation and fraud in the inducement in violation of Federal and
California State law; are void *ab initio*.

1 The very existence of a contract is the very heart of our commercial system as both
2 parties operate in good faith and any **"illegal provisions of the contract are "void," and**
3 **thus those provisions were never part of a validly formed contract."** *Three Valleys*
4 *Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991), and
5 "voidness" challenges go to the very existence of a contract provision, and are not merely
6 a defense to a legally formed contract." And one valid defense that the Defendants are
7 raising is **"unconscionability is not merely a defensive doctrine but rather it goes to**
8 **the predicate of whether a contract was validly formed in the first place."** *California*
9 *Grocers Ass'n, Inc. v. Bank of America*, 22 Cal.App.4th 205, 217 (1994); and the "Doctrine
10 of Unconscionability," procedural and/or substantively are the tools to determine the
11 validity of any contract thus ignoring for now the four main elements of a contract.

12 Plaintiff is raising the unconscionability aspect of the mortgage (*ARS 47-2302*
13 *Unconscionable contract or clause*) as referenced in "*Blake v. Ecker*, 93 Cal.App.4th 728,
14 742 (2001)" (the substantive element of unconscionability **"traditionally involves**
15 **contract terms that are so one-sided as to 'shock the conscience' or that impose harsh**
16 **or oppressive terms."**) (*Emphasis added*) (citing *Armendariz*, 24 Cal.4th at 114).
17 Anyone who would knowingly agree to a non-judicial foreclosure, where the illegally
18 appointed bank trustee has the power to foreclose on your home at his and/or her whim, is
19 ludicrous and would have to be totally incompetent.

20 The contract is procedurally unconscionable if "the contract is a standard-form
21 contract, drafted by the party with superior bargaining power, which relegates to the other
22 party the option of adhering to its terms without **modification or rejecting the contract**
23 **entirely.;**" *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.App.4th 846, 853 (2001)
24 (same); *Mercuro v. Superior Court*, 96 Cal.App.4th 167, 174 (2002), *rev. denied*.

25 Plaintiff states emphatically that this Court should grant the temporary injunction to
26 allow Defendants sufficient time to disprove that the Deed of Trust is, in fact, a contract
27 void ab initio, and, to dispute Plaintiff's averment to the contrary, that the creation of the
28 contract is supported by a clear and convincing intent of the Plaintiff, for existence of

1 **mutual or reciprocal assent.** *Sanford v. Abrams* (1888) 24 Fla 181, 2 So 373; *Ross v.*
2 *Savage* (1913) 66 Fla 106, 63 So 148; *McCay v. Sever* (1929) 98 Fla 710, 124 So 44;
3 *United State Rubber Products, Inc. v. Clark* (1941) 145 Fla 631, 200 So 385; *Mann v.*
4 *Thompson* (1958, Fla App D1) 100 So 2d 634.

5 The Plaintiff hereby states that for a valid contract to exist with the Defendants
6 and/or any entity, the contract must have **assent be to a certain and definite proposition.**
7 For example, this Court, operating under cold neutrality, should demand that both sides
8 produce all the substantial records, including and not limited to the accounting records for
9 a determination as far as consideration. *Fincher v. Belk-Sawyer Co.* (1961, Fla App D3)
10 127 So 2d 130; *Goff v. Indian Lake Estates, Inc.* (1965, Fla App D2) 178 So 2d 910;
11 *Hewitt v. Price* (1969, Fla App D3) 222 So 2d 247.

12 The Plaintiff contends that without a **meeting of the minds of the parties on an**
13 **essential element (consideration), there can be no enforceable contract.** *Hettenbaugh*
14 *v. Keyes-Ozon-Fincher Ins., Inc.* (1962, Fla App D3) 147 So 2d 328; *Goff v. Indian Lake*
15 *Estates, Inc.* (1965, Fla App D2) 178 So 2d 910.

16 The Plaintiff has established enough doubt as to the validity of an enforceable
17 contract that this court is required to determine the enforceability of the contract and
18 determined what party breached the terms and conditions of the contract and in order to
19 form a valid contract, **the parties must have a distinct understanding,** common to both,
20 **and without doubt or difference. Unless all understand alike, there can be no assent,**
21 **and therefore no contract.** *Webster Lumber Co. v. Lincoln* (1927) 94 Fla 1097, 115 So
22 498; *Minsky's Follies of Florida, Inc v. Sennes* (1953 206 F2d 1; *O'Neill v. Corporate*
23 *Trustees, Inc.* (1967) 376 F2d 818.

24 The Plaintiff hereby declares that the Defendants have greatly injured the Plaintiff
25 through and not limited to misrepresentation, truth in lending, UDAP and unjust
26 enrichment as a result of the Defendant's deliberate, conspired, intentional, and malicious
27 fraud. Further, Defendants' and/or their counsel have violated, inter alia, the Professional
28 Code of Conduct and procured this illegal and/or voidable contract which lacks the

1 essential elements of real assent and obtained the Plaintiff's Signature as result of the
2 exercise of duress or undue influence by the other party, or procured by the fraud of
3 one of the parties, lacks the essential element of real assent and may be avoided by
4 the injured party. *Wall v. Bureau of Lathing and Plastering* (1960, Fla App D3) 117 So
5 2d 767.

6 Being that the Plaintiff is asking for this court to protect Plaintiff's due process
7 rights and stay the sale and provide the Plaintiff with their right to a Trial by Jury for the
8 Plaintiff never agreed to a non-judicial foreclosure and any entity must prove compliance
9 with all the terms and conditions and specifically consideration and substantiate actual
10 assent by the parties upon exactly the same matters is indispensable to the formation
11 of a contract. *Bullock v. Hardwick* (1947) 158 Fla 834, 30 So 2d 539; *Hettenbaugh v.*
12 *Keyes- Ozon - Fincher Ins. , Inc* (1962, Fla App D3) 147 So 2d 328; *General Finance*
13 *Corp. V. Stratton* (1963 Fla App D1) 156 So 2d 664.

14 Unconscionability is deemed to exist when a two-prong test is met, that is, when it
15 is established that both procedural and substantive unconscionability exist. *Blake v. Ecker,*
16 *93 Cal App 4th 728 (2001).* According to *Restatement of Contracts (2nd Ed. 1990)*
17 *commentary accompanying section 208.*

18 Most state unconscionability jurisprudence is sub-divided into two branches:
19 substantive and procedural. Substantive unconscionability refers to oppressively one-sided
20 and harsh terms of a contract, while procedural unconscionability involves the manner and
21 process by which the terms become part of the contract including unequal bargaining
22 power and hidden contract terms. *Comb v. PayPal Inc., Case No. C-02-1227 and C-02-*
23 *2777 USDC CA No. Dist. San Jose Div (9th Cir. 2002); Blake, supra; Kloss v. Edward D.*
24 *Jones & Co., 2002 MT 129; 310 Mont. 123; 54 P3d 1; 2002 Mont. LEXIS 223 (MT Sup Ct*
25 *2002).*

26 The process by which a contract comes into existence is at the heart of procedural
27 unconscionability such that the contract in question is typically one of adhesion. *Flores v.*
28 *Transamerica HomeFirst, Inc., 93 Cal App 4th 846 (2001).*

1 Analysis of unconscionability begins with an inquiry into whether the contract
2 (Deed of Trust) was a contract of adhesion i.e., a standardized contract, imposed upon the
3 subscribing party without an opportunity to negotiate the terms and the conditions is an
4 oppressive, "take it or leave it offer," an inequality of bargaining position when under
5 scrutiny are so one sided that the terms and conditions are so supportive of the superior
6 bargaining power and actually detrimental or no real negotiations and an absence of
7 meaningful choice through an unequal bargaining position of the weaker party.

8 *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 113, 99 Cal.
9 *Rptr. 2d* 745, 6 P.3d 669 (2000). *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 819, 171
10 *Cal. Rptr. 604*, 623 P.2d 165 & n.16 (1981).

11 Plaintiff never agreed to place their property in an irrevocable trust, nor, did
12 Plaintiff ever knowingly agree to have their home subject to a power of sale clause. As a
13 matter of fact, Plaintiff hereby declares that they have never heard of that term power of
14 sale, and, what that term meant, until recently.

15 Plaintiff likewise, did not know that the term "seised" imparted a wholly different
16 connotation than "seized", whereby, upon recent understanding of Plaintiff, "seised"
17 indicates that Plaintiff actually owned their property free and clear, without encumbrance,
18 prior to signing a Deed of Trust, without benefit of consideration.

19 The concept of seising, dates back to the middle ages when the serfs, who were
20 made to consider themselves not worthy of owning land, would actually give their
21 properties through seising (gave it away absolutely free) to their masters. Today this
22 unconscionable practice is still being utilized by bankers, constituting an unjust
23 enrichment, through concealment and deception and outright ignorance on this Plaintiff,
24 who suffers from the least susceptible and/or susceptible consumer syndrome.

25 Plaintiff now challenges this practice as being procedural and substantively
26 unconscionable; Clauses contained in this referenced contract (Deed of Trust) should be
27 challenged by this court as the Deed of Trust, did not and does not represent the true
28 intentions of the Plaintiff.

1 Plaintiff would not knowingly agree to the placing of an irrevocable trust against
2 their home by any mortgage company and/or banker and would not have given their
3 property to anyone through the middle ages policy of seising. At trial, it would become
4 apparent that the trier of facts could not find an objectively clear and unambiguous
5 expression of mutual intent of these objectionable and substantively unconscionably
6 shocking terms.

7 In the absence of conflicting parol evidence, the interpretation of a written contract
8 is essentially a judicial function subject to independent review by this Court or on appeal.
9 A trial court's threshold determination as to whether there is an ambiguity permitting the
10 admission of parol evidence is also a question of law subject to independent review.

11 If parol evidence is admissible, and the competent parol evidence is in conflict, the
12 construction of the contract becomes a question of fact. However, if the parol evidence is
13 not conflicting, the appellate court will independently construe the writing.

14 The duty of this Court is to schedule a hearing and permit the Defendants to
15 actually produce documented evidence that Plaintiff, understood that Plaintiff was already
16 lawfully seised of property by signing the Deed of Trust, and thereafter, knowingly,
17 intentionally, and, deliberately agreed to a (unseen) power of sale clause, and, irrevocable
18 grant, executed, without consideration, to the sole benefit of Defendants.

19 However, this Court should also recognize the risk that such provisions may be
20 included in a trust deed or mortgage without the debtor's knowledge or understanding.
21 Clauses such as this are often termed "dragnet" or "anaconda," as by their broad and
22 general terms they enwrap the unsuspecting debtor in the folds of indebtedness and
23 deceptive practices (concealing deceptively, the power of sale clause in which Plaintiff
24 never was told and/or knew that it was actually part of the alleged contract).

25 The proponent of a dragnet clause bears the burden of establishing that the parties
26 intended all existing or contemporaneous clauses to be included within its scope. A trust
27 deed containing a dragnet clause that is printed on a standard bank form is considered a
28 **contract of adhesion** under California law.

1 Although **contracts of adhesion** are generally enforceable according to their terms,
2 a provision contained in such a contract cannot be enforced if it does not fall within the
3 reasonable expectations of the weaker or adhering party.

4 This Court should examine a number of factors in determining whether broadly
5 worded dragnet clauses (Seised and irrevocable trust) was mutually intended by the parties
6 to be included in the terms and conditions: (1) the language and specificity of the dragnet
7 clause; (2) whether the parties were aware of the dragnet clause and appreciated its
8 significance and would have benefited by their existence; (3) were the clauses
9 procedurally and/or substantively unconscionable and benefited the one party at the
10 expense of the other party taking into account the degree of negotiability being exerted
11 upon the smaller party with inferior bargaining position against the larger party with
12 superior bargaining power.

13 The Defendant's intentional concealment of the Power of Sale Clause in the Deed
14 of Trust further insures Plaintiff's allegations of deceptive intentions of the Defendants.

15 Plaintiff hereby avers that for this Court to precede with this sale, this Court must
16 find an objective and clear unambiguous expression of mutual intent to where the Plaintiff
17 intentionally, deliberately, knowingly desired to place the home into a non-revocable trust,
18 to allow the Defendant's to have the home seised, power of sale and knowingly waived
19 due process rights including and not limited to trial by jury. This Court has in its inherent
20 authority, the duty to stop this "Deed of Trust Sale" upon the unsuspecting mortgagor in
21 the folds of indebtedness embraced and secured in the mortgage which Plaintiff did not
22 contemplate or understand their presence or implications.

23 However, "[t]here are two judicially imposed limitations on the enforcement of
24 adhesion contracts or provisions thereof. The first is that such a contract or provision
25 which does not fall within the reasonable expectations of the weaker or 'adhering' party
26 will not be enforced against him . . . The second - a principle of equity applicable to all
27 contracts generally - is that a contract or provision, even if consistent with the reasonable
28

1 expectations of the parties, will be denied enforcement if, considered in its context, it is
2 unduly oppressive or unconscionable.

3 The irrevocable trust, the hidden power of sale clause, due process violations and
4 the seising clauses are four examples of Plaintiff being involved with procedural and
5 substantive violations of unconscionability, thus voiding this contract from its incipience.

6 A contract of adhesion is "a standardized contract, which, imposed and drafted by
7 the party of superior bargaining strength, relegates to the subscribing party only the
8 opportunity to adhere to the contract or reject it" (*Armendariz v. Foundation Health*
9 *Psychcare Serv.*, 24 Cal 4th 83 at 113 (2000); reflected in *Martinez v. Master Protection*
10 *Corp.*, 118 Cal. App. 4th 107; 2004 Cal. App. LEXIS 638 (2004) -- is not unconscionable
11 merely because of disparity of the parties' bargaining position (*Gilmer v.*

12 *Interstate/Johnson Lane Corp.*, 500 US 20; 114 L. Ed. 2d 26, 111 St. Ct. 1647 (1991)).

13 Rather, the procedural unconscionability must co-exist with substantive components that
14 include harsh or one-sided results that "shock the conscience". *Soltani v. West. & So. Life*
15 *Ins. Co.*, 258 F.3d 1038 (9th Cir. 2001); *Ferguson v. Countrywide Credit Industries, Inc.*,
16 298 F.3d 778; 2002 U.S. App. LEXIS 14739 (9th Cir. 2002); *Circuit City Stores, Inc. v.*
17 *Mantor*, 335 F.3d 1101; 2003 U.S. App. LEXIS 14607 (9th Cir. 2003).

18 When a party to a contract possesses far greater bargaining power (Defendants
19 and/or any entity) than another party (Plaintiff), or when the stronger party pressures,
20 harasses, or compels another party into entering into a contract, "oppression and,
21 therefore, procedural unconscionability, are present." *Ingle v. Circuit City Stores, Inc.*, 328
22 *F.3d 1165*, at 1172 (9th Cir. 2003) (quoting *Ferguson v. Countrywide Credit Indus., Inc.*,
23 298 F.3d 778 (9th Cir. 2002); *Kinney v United HealthCare Services, Inc.*, 70 Cal App 4th
24 1322 (1999).

25 Substantive unconscionability addresses the fairness of the term in dispute. It
26 traditionally involves contract terms that are so one-sided as to "shock the conscience," or
27 impose harsh or oppressive terms. Historically, courts looked to the common law for
28 discerning the existence of substantive unconscionability as in *Rakoff, Contracts of*

1 *Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1179-1180 (1983);
2 *Slawson, Mass Contracts: Lawful Fraud in California*, 48 S. Cal. L. Rev. 1, 12-13 (1974);
3 *K. Llewellyn, The Common Law Tradition* 370-371 (1960).

4 "The common law, recognizing that standardized form contracts account for a
5 significant portion of all commercial agreements...subjects terms in contracts of adhesion
6 to scrutiny for reasonableness." Judge J. Skelly Wright set out the state of the law
7 succinctly in *Williams v. Walker-Thomas Furniture Co.*, 121 U. S. App. D. C. 315, 319-
8 320, 350 F. 2d 445, 449-450 (1965) (footnotes omitted):

9 "Ordinarily, one who signs an agreement without full knowledge of its terms might
10 be held to assume the risk that he has entered a one-sided bargain. But when a party of
11 little bargaining power, and hence little real choice, signs a commercially unreasonable
12 contract with little or no knowledge of its terms, it is hardly likely that Plaintiff's consent,
13 or even an objective manifestation of Plaintiff's consent, was ever given to all of the
14 terms. In such a case the usual rule that the terms of the agreement are not to be
15 questioned should be abandoned and the court should consider whether the terms of the
16 contract are so unfair that enforcement should be withheld."

17 Pursuant to the Declaratory Judgment Act, this Honorable Court may enter a declaratory
18 judgment to determine the rights of the Plaintiff, regarding the aforesaid claims and
19 controversies arising therefrom.

20 **TEMPORARY RESTRAINING ORDER**

21 The primary purpose of a temporary restraining order is to prevent irreparable
22 injury and harm caused without right to the Plaintiff, and, to allow time for determining
23 the legal rights, status and relations of the Plaintiff and the Defendants.

24 A temporary restraining order is absolutely necessary in the present instance to
25 speedily effectuate the rights and status of Plaintiff in relation to the Defendants as well as
26 delineate the authority of each of the Defendants in their actions as taken against the
27 Plaintiff.
28

1 Delay in granting Plaintiff's request for a temporary restraining order will result in
2 irreparable harm and injury to Plaintiff, without ability to otherwise address Plaintiff's
3 grievances to the degree and means that would be otherwise availed.

4 Temporary restraining order is proper when (1) a reasonable likelihood of success;
5 (2) irreparable harm; (3) the balance of harms is in the movant's favor; and (4) the public
6 interest is favorably impacted.

7 An actual controversy exists between Plaintiff and Defendants, both individually
8 and collectively, as Defendants continue to usurp Plaintiff's rights, unabated, in the
9 wholesale deprivation of Plaintiff's rights and, abrogation of Plaintiff's property.

10 Additional litigation is imminent and inevitable, pending this court's determination
11 of the controversy, that in the absence thereof, Plaintiff will be forced to proceed in
12 securing their rights, as opposed to Defendants meritless and/or unlawful actions
13 undertaken against Plaintiff.

14 Plaintiff clearly has a direct, substantial and present interest in the controversy.

15 A temporary restraining order will aid in ending the controversy, or in the
16 alternative, clearly establish the rights of Plaintiff and the authority and/or lack thereof, of
17 Defendant(s).

18 As to element (1), Plaintiff is highly likely to be successful in litigation as
19 Defendant have no evidence to substantiate their fraud.

20 As to element (2), absent the temporary restraining order, Defendant will steal
21 Plaintiff's property and convert said property, in which case a third party may be harmed
22 by Defendant's criminal activity.

23 As to element (3), Defendant's fraud will greatly harm Plaintiff.

24 As to element (4), it is in the public interest to prevent criminal enterprises from
25 committing fraud against the people.

26 **DECLARATORY RELIEF**
27
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1 Pursuant to the Declaratory Judgment Act, this Honorable Court may enter a
2 declaratory judgment to determine the rights of the Plaintiff, regarding the aforesaid
3 claims and controversies arising therefrom.

4 The primary purpose of a declaratory judgment is to quickly determine issues, if
5 left otherwise delayed, will cause irreparable injury and harm to the Plaintiff, and, to
6 afford certain relief from uncertainty and insecurity by effectively determining the legal
7 rights, status and relations of the Plaintiff and the Defendants.

8 A declaratory judgment is absolutely necessary in the present instance to speedily
9 effectuate the rights and status of Plaintiff in relation to the Defendants as well as
10 delineate the authority of each of the Defendants in their actions as taken against the
11 Plaintiff.

12 Delay in granting Plaintiff's request for a declaratory judgment will result in
13 irreparable harm and injury to Plaintiff, without ability to otherwise address Plaintiff's
14 grievances to the degree and means that would be otherwise availed.

15 Declaratory judgments are proper when (1) an actual controversy exists, (2)
16 litigation appears imminent and inevitable, (3) the Plaintiff has a direct, substantial and
17 present interest, and (4) the declaration sought will be of practical help in ending the
18 controversy.

19 An actual controversy exists between Plaintiff and Defendants, both individually
20 and collectively, as Defendants continue to usurp Plaintiff's rights, unabated, in the
21 wholesale deprivation of Plaintiff's rights and, abrogation of Plaintiff's property.

22 Additional litigation is imminent and inevitable, pending this court's determination
23 of the controversy, that in the absence thereof, Plaintiff will be forced to proceed in
24 securing their rights, as opposed to Defendants meritless and/or unlawful actions
25 undertaken against Plaintiff.

26 Plaintiff clearly has a direct, substantial and present interest in the controversy.
27
28

1 A declaratory judgment will aid in ending the controversy, or in the alternative,
2 clearly establish the rights of Plaintiff and the authority and/or lack thereof, of
3 Defendant(s).

4 **INJUNCTIVE RELIEF**
5

6 Plaintiff's right to injunctive relief seems clear: An injunction is absolutely
7 necessary to avoid a further and yet greater injury, as result of Defendants continued and
8 unbridled actions.

9 It is abundantly clear from the foregoing cause(s) as stated herein, that, sufficient
10 grounds to warrant an injunction have been established, until, all facts are fully and
11 properly clarified, as, to be accomplished following the completion of discovery.

12 It is averred that Defendants, both individually and collectively, have acted in bad
13 faith, in their attempts to unlawfully wrestle Plaintiff's property.

14 It is averred that Defendants, whether individually and/or collectively, have entered
15 certain documents into the public record, for the purpose of reliance thereupon, which,
16 Plaintiff believes are not supported by the facts, should this Court allow them to be
17 brought to light.

18 Plaintiff will be irreparably harmed, without effective recourse, should this Court
19 deny Plaintiff's plea for injunctive relief; whereas, Defendants will not be so harmed,
20 should this court grant Plaintiff's relief, pending the full and complete adjudication of
21 salient issues as raised in this complaint.

22 Because of the intentional deceptive nature of the Defendants, this Court should
23 grant the temporary injunction in the name of justice and a matter of good law. **"Where**
24 **administrative action may result in the loss of property and/or life, or of all that**
25 **makes life worth living, and doubt as to the extent of power delegated to**
26 **administrative officials is to be resolved in citizen's favor and court must be**
27
28

1 especially sensitive to the citizen's rights where proceeding is non-judicial." *United*
2 *States v. Minker*, 350 U.S. 179; 76 S. Ct. 281 (1956).

3
4 **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S PETITION**

5 **HOW AND WHY THE BANK MUST SWITCH CURRENCY**

- 6 1. NOT FULFILL THE LOAN AGREEMENT
7 2. OBTAIN YOUR MORTGAGE NOTE WITHOUT INVESTING ONE CENT
8 3. FORCING YOU TO LABOR TO PAY INTEREST ON THE CONTRACT
9 4. THE BANK REFUSES TO FULFILL THE CONTRACT
10 5. MAKES YOU A DEPOSITOR NOT A BORROWER

12 The oldest scheme throughout History is the changing of currency. Remember the
13 moneychangers in the temple? They changed currency as a business. You would have to
14 convert to Temple currency in order to buy an animal for sacrifice. The Temple Merchants
15 made money by the exchange. The Bible calls it unjust weights and measures, and judges
16 it to be an abomination. Jesus cleared the Temple of these abominations. Our Christian
17 Founding Fathers did the same. Ben Franklin said in his autobiography, "...the inability of
18 the colonists to get the power to issue their own money permanently out of the hands of
19 King George III and the international bankers was the prime reason for the revolutionary
20 war." The year 1913 was the third attempt by the European bankers to get their system
21 back in place within the United States of America. President Andrew Jackson ended the
22 second attempt in 1836. What they could not win militarily in the Revolutionary War they
23 attempted to accomplish by a banking money scheme which allowed the European Banks
24 to own the mortgages on nearly every home, car, farm, ranch, and business at no cost to
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1 the bank. Requiring "We the People" to pay interest on the equity we lost and the bank
2 got free.

3 Today people believe that cash and coins back up the all checks. If you deposit
4 \$100 of cash, the bank records the cash as a bank asset (debit) and credits a Demand
5 Deposit Account (DDA), saying that the bank owes you \$100. For the \$100 liability the
6 bank owes you, you may receive cash or write a check. If you write a \$100 check, the
7 \$100 liability your bank owes you is transferred to another bank and that bank owes \$100
8 to the person you wrote the check to. That person can write a \$100 check or receive cash.
9 So far there is no problem.

12 Remember one thing however, for the check to be valid there must first be a
13 deposit of money to the bank's **ASSETS**, to make the check (liability) good. The liability
14 is like a **HOLDING ACCOUNT** claiming that money was deposited to make the check
15 good.

17 Here then, is how the switch in currency takes place.

18 The bank advertises it loans' money. The bank says, "Sign here". However the
19 bank never signs because they know they are not going to lend you theirs, or other
20 depositor's money. Under the law of bankruptcy of a nation, the mortgage note acts like
21 money. The bank makes it look like a loan but it is not. **It is an exchange.**

23 **The bank receives the equity in the home you are buying, for free, in exchange**
24 **for an unpaid bank liability that the bank cannot pay, without returning the**
25 **mortgage note. If the bank had fulfilled its end of the contract, the bank could not**
26 **have received the equity in your real property for free.**

1 **The bank receives your mortgage note without investing or risking one-cent.**

2 **The bank sells the mortgage note, receives cash or an asset that can then be**
3 **converted to cash and still refuses to 'loan' you their or other depositors' money or**
4 **pay the liability it owes you. On a \$100,000 loan the bank does not give up \$100,000.**

5 The bank receives \$100,000 in cash or an asset and issues a \$100,000 liability (check) the
6 bank has no intention of paying. The \$100,000 the bank received in the alleged loan is the
7 equity (lien on property) the bank received without investment, and it is the \$100,000 the
8 individual lost in equity to the bank. The \$100,000 equity the individual lost to the bank,
9 which demands he/she repay plus interest.

10 The loan agreement the bank told you to sign said "LOAN." The bank broke that
11 agreement. The bank now owns the mortgage note without loaning anything. The bank
12 then deposited the mortgage note in an account they opened under your name without
13 your authorization or knowledge. The bank withdrew the money without your
14 authorization or knowledge using a forged signature. The bank then claimed the money
15 was the banks' property, which is a fraudulent conversion and a blatant lie.

16 The mortgage note was deposited or debited (asset) and credited to a Direct Deposit
17 Account, (DDA) (liability). The credit to DDA (liability) was used from which to issue the
18 check. The bank just switched the currency. The bank demands that you cannot use the
19 same currency, which the bank deposited (promissory notes or mortgage notes) to
20 discharge your mortgage note. The bank refuses to loan you other depositors' money, or
21 pay the liability it owes you for having deposited your mortgage note.

1 To pay this liability the bank must return the mortgage note to you. However
2 instead of the bank paying the liability it owes you, the bank demands you use these
3 unpaid bank liabilities, created in the alleged loan process, as the new currency. Now you
4 must labor to earn the bank currency (unpaid liabilities created in the alleged loan process)
5 to pay back the bank. What the bank received for free, the individual lost in equity.
6 If you tried to repay the bank in like kind currency, (which the bank deposited without
7 your authorization to create the check they issued you), then the bank claims the
8 promissory note is not money. They want payment to be in legal tender (check book
9 money).

12 The mortgage note is the money the bank uses to buy your property in the
13 foreclosure. They get your real property at no cost. If they accept your promissory note to
14 discharge the mortgage note, the bank can use the promissory note to buy your home if
15 you sell it. Their problem is, the promissory note stops the interest and there is no lien on
16 the property. If you sell the home before the bank can find out and use the promissory note
17 to buy the home, the bank lost nothing. The bank claims they have not bought the home at
18 no cost. Question is, what right does the bank have to receive the mortgage note at no cost
19 in direct violation of the contract they wrote and refused to sign or fulfill.

22 By demanding that the bank fulfill the contract and not change the currency, the
23 bank must deposit your second promissory note to create check book money to end the
24 fraud, putting everyone back in the same position they where, prior to the fraud, in the first
25 place. Then all the homes, farms, ranches, cars and businesses in this country would be
26 redeemed and the equity returned to the rightful owners (the people). If not, every time the
27
28

1 homes are refinanced the banks get the equity for free. You and I must labor 20 to 30
2 years full time as the bankers sit behind their desks, laughing at us because we are too
3 stupid to figure it out or to force them to fulfill their contract.
4

5 The \$100,000 created inflation and this increases the equity value of the homes. On
6 an average homes are refinanced every 7 ½ years. When the home is refinanced the bank
7 again receives the equity for free. What the bank receives for free the alleged borrower
8 loses to the bank.
9

10 According to the Federal Reserve Banks' own book of Richmond, Va. titled
11 "YOUR MONEY" page seven, "...demand deposit accounts are not legal tender..." If
12 a promissory note is legal tender, the bank must accept it to discharge the mortgage note.
13 The bank changed the currency from the money deposited, (mortgage note) to check book
14 money (liability the bank owes for the mortgage note deposited) forcing us to labor to pay
15 interest on the equity, in real property (real estate) the bank received for free. This cost
16 was not disclosed in **NOTICE TO CUSTOMER REQUIRED BY FEDERAL LAW,**
17 **Federal Reserve Regulation Z.**
18

19
20 When a bank says they gave you credit, they mean they credited your transaction
21 account, leaving you with the presumption that they deposited other depositors money in
22 the account. The fact is they deposited your money (mortgage note). The bank cannot
23 claim they own the mortgage note until they loan you their money. If the bank deposits
24 your money, they are to credit a Demand Deposit Account under your name, so you can
25 write checks and spend your money. In this case they claim your money is their money.
26
27
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1 Ask a criminal attorney what happens in a fraudulent conversion of your funds to the
2 bank's use and benefit, without your signature or authorization.

3 What the banks could not win voluntarily, through deception they received for free.
4 Several presidents, John Adams, Thomas Jefferson, and Abraham Lincoln believed that
5 banker capitalism was more dangerous to our liberties than standing armies. U.S.
6 President James A. Garfield said, "Whoever controls the money in any country is absolute
7 master of industry and commerce."
8

9 The Chicago Federal Reserve Bank's book, "Modern Money Mechanics", explains
10 exactly how the banks expand and contract the checkbook money supply forcing people
11 into foreclosure. This could never happen if contracts were not violated and if we received
12 equal protection under the law of Contract.
13

14 HOW THE BANK SWITCHES THE CURRENCY

15 This is a repeat worded differently to be sure you understand it.

16 *You must understand the currency switch.*

17 The bank does not loan money. The bank merely switches the currency. The
18 alleged borrower created money or currency by simply signing the mortgage note. The
19 bank does not sign the mortgage note because they know they will not loan you their
20 money. The mortgage note acts like money. To make it look like the bank loaned you
21 money the bank deposits your mortgage note (lien on property) as money from which to
22 issue a check. No money was loaned to legally fulfill the contract for the bank to own the
23 mortgage note. By doing this, the bank received the lien on the property without risking or
24 using one cent. The people lost the equity in their homes and farms to the bank and now
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1 they must labor to pay interest on the property, which the bank got for free and the people
2 lost.

3 The check is not money, the check merely transfers money and by transferring
4 money the check acts LIKE money. The money deposited is the mortgage note. *If the bank*
5 *never fulfills the contract to loan money, then the bank does not own the mortgage note.*

6
7 The deposited mortgage note is still your money and the checking account they set up in
8 your name, which they credited, from which to issue the check, is still your money. They
9 only returned your money in the form of a check. Why do you have to fulfill your end of
10 the agreement if the bank refuses to fulfill their end of the agreement? If the bank does not
11 loan you their money they have not fulfilled the agreement, the contract is void.

12
13 **You created currency by simply signing the mortgage note.** The mortgage note
14 has value because of the lien on the property and because of the fact that you are to repay
15 the loan. The bank deposits the mortgage note (currency, MN) to create a check (currency,
16 BM) (bank money). Both currencies cost nothing to create. By law the bank cannot create
17 currency (BM a check) without first depositing currency, (MN) or legal tender. For the
18 check to be valid there must be MN or BM as **legal tender**, but the bank accepted
19 currency (MN) as a deposit without telling you and without your authorization.

20
21
22 The bank withdrew your money, which they deposited without telling you and
23 withdrew it without your signature, in a fraudulent conversion scheme, which can land the
24 bankers in jail but is played out in every City and Town in this nation on a daily basis.

25
26 **Without loaning you money, the bank deposits your money (MN), withdraws it**
27 **and claims it is the bank's money and that it is their money they loaned you.**
28

1 It is not a loan, it is merely an exchange of one currency for another, they'll owe
2 you the money, which they claimed they were to loan you. If they do not loan the money
3 and merely exchange one currency for another, the bank receives the lien on your property
4 for free. What they get for free you lost and must labor to pay back at interest.
5

6 If the banks loaned you legal tender, they could not receive the liens on nearly
7 every home, car, farm, and business for free. The people would still own the value of their
8 homes. The bank must sell your currency (MN) for legal tender so if you use the bank's
9 currency (BM), and want to convert currency (BM) to legal tender they will be able to
10 make it appear that the currency (BM) is backed by legal tender. The bank's currency
11 (BM) has no value without your currency (MN). The bank cannot sell your currency (MN)
12 without fulfilling the contract by loaning you their money. They never loaned their money,
13 they merely exchanged one currency for another. The bank received your currency for
14 free, without making any loan or fulfilling the contract, changing the cost and the risk of
15 the contract wherein they refused to sign, knowing that it is a change of currency and not a
16 loan.
17
18

19 If you use currency (MN), the same currency the bank deposited to create currency
20 (BM), to pay the loan, the bank rejects it and says you must use currency (BM) or legal
21 tender. The bank received your currency (MN) and the bank's currency (BM) for free
22 without using legal tender and without loaning money thereby refusing to fulfill the
23 contract. Now the bank switches the currency without loaning money and demands to
24 receive your labor to pay what was not loaned or the bank will use your currency (MN)
25 (mortgage note) to buy your home in foreclosure. The Revolutionary war was fought to
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1 stop these bank schemes. The bank has a written policy to expand and contract the
2 currency (BM), creating recessions, forcing people out of work, allowing the banks to
3 obtain your property for free.
4

5 If the banks loaned legal tender, this would never happen and the home would cost
6 much less. If you allow someone to obtain liens for free and create a new currency, which
7 is not legal tender and you must use legal tender to repay. This changes the cost and the
8 risk.
9

10 Under this bank scheme, even if everyone in the nation owned their homes and
11 farms debt free, the banks would soon receive the liens on the property in the loan process.
12 The liens the banks receive for free are what the people lost in property, and now must
13 labor to pay interest on. The interest would not be paid if the banks fulfilled the contract
14 they wrote. If there is equal protection under the law and contract, you could get the
15 mortgage note back without further labor. Why should the bank get your mortgage note
16 and your labor for free when they refuse to fulfill the contract they wrote and told you to
17 sign?
18

19
20 Sorry for the redundancy, but it is important for you to know by heart their "shell
21 game", I will continue in that redundancy as it is imperative that you understand the
22 principle. The following material is case law on the subject and other related legal issues
23 as well as a summary.
24

25 LOGIC AS EVIDENCE

26 The check was written without deducting funds from SA or CD allowing the MN to
27 become the new, pool of money owed to DDA, SA, CD with DDA, SA, CD increasing by
28

1 the amount of the MN. In this case the bankers sell the MN for FRBN's or other assets
2 while still owing the liability for the MN sold and without the bank giving up any-
3 FRBN'S.
4

5 If the bank had to part with FRBN'S, and without the benefit of checks to hide the
6 fraudulent conversion of the MN from which it issues the check, the bank fraud would be
7 exposed.
8

9 FRBN's are the only money called legal tender. If only FRBN's are deposited for
10 the credit to DDA- SACD, and if the bank wrote a check for the MN, the check then
11 transfers FRBN's and the bank gives the borrower a bank asset. There is no increase in the
12 check book money supply that exists in the loan process.
13

14 The bank policy is to increase bank liabilities; DDA, SK, CD, by the MN. If the
15 MN is money, then the bank never gave up a bank asset. The bank simply used fraudulent
16 conversion of ownership of the MN. The bank cannot own the MN until the bank fulfills
17 the contract.
18

19 The check is not the money; the money is the deposit that makes the check good. In
20 this case, the mortgage note is the money from which the check is issued. Who owns the
21 MN when the MN is deposited? The borrower owns the MN because the bank never paid
22 money for the MN and never loaned money (bank asset). The bank simply claimed the
23 bank owned the MN without paying for it and deposited the MN from which the check
24 was issued. This is fraudulent conversion. The bank risked nothing! Not even one penny
25 was invested. They never took money out of any account, in order to own the MN, as
26
27
28

1 proven by the bookkeeping entries, financial ratios, the balance sheet, and of course the
2 bank's literature. The bank simply never complied with the contract.

3 If the MN is not money, then the check is check kiting and the bank is insolvent
4 and the bank still never paid. If the MN is money, the bank took our money without
5 showing us the deposit, and without paying for it, which is fraudulent conversion. The
6 bank claimed it owned the MN without paying for it, then sold the MN, took the cash and
7 never used the cash to pay the liability it owed for the check the bank issued. The liability
8 means that the bank still owes the money. The bank must return the MN or the cash it
9 received in the sale, in order to pay the liability. Even if the bank did this, the bank still
10 never loaned us the bank's money, which is what 'loan' means. The check is not money but
11 merely an order to pay money. If the mortgage note is money then the bank must pay the
12 check by returning the MN.
13
14
15

16 The only way the bank can pay FRBN's for the check issued is to sell the MN for
17 FRBN's. FRBN's are non-redeemable in violation of the UCC. The bank forces us to trade
18 in non-redeemable private bank notes of which the bank refuses to pay the liability owed.
19 When we present the FRBN's for payment the bank just gives us back another FRBN
20 which the bank paid 2 ½ cents for per bill regardless of denomination.
21

22 What a profit for the bank!

23 The check issued can only be redeemed in FRBN's, which the bank obtained by
24 selling the MN that they paid nothing for.
25
26
27
28

1 The bank forces us to trade in bank liabilities, which they never redeem in an asset.
2 We the people are forced to give up our assets to the bank for free, and without cost to the
3 bank.

4 This is fraudulent conversion making the contract, which the bank created with
5 their policy of bookkeeping entries, illegal and the alleged contract null and void.

6 The bank has no right to the MN or to a lien on the property, until the bank performs
7 under the contract.

8 The bank had less than ten percent of FRBN's to back up the bank liabilities in
9 DDA, SA, or CD's. A bank liability to pay money is not money. When we try and repay
10 the bank in like funds (such as is the bank's policy to deposit from which to issue checks)
11 they claim it is not money. The bank's confusing and deceptive trade practices and their
12 alleged contracts are unconscionable.

13 SUMMARY OF DAMAGES

14 The bank made the alleged borrower a depositor by depositing a \$100,000
15 negotiable instrument, which the bank sold or had available to sell for approximately
16 \$100,000 in legal tender. The bank did not credit the borrower's transaction account
17 showing that the bank owed the borrower the \$100,000. Rather the bank claimed that the
18 alleged borrower owed the bank the \$100,000, then placed a lien on the borrower's real
19 property for \$100,000 and demanded loan payments or the bank would foreclose.

20 The bank deposited a non-legal tender negotiable instrument and exchanged it for
21 another non-legal tender check, which traded like money, using the deposited negotiable
22 instrument as the money deposited. The bank changed the currency without the borrower's
23

1 authorization. First by depositing non legal tender from which to issue a check (which is
2 non-legal tender) and using the negotiable instrument (your mortgage note), to exchange
3 for legal tender, the bank needed to make the check appear to be backed by legal tender.
4

5 No loan ever took place. **Which shell hides the little pea?**

6 The transaction that took place was merely a change of currency (without
7 authorization), a negotiable instrument for a check. The negotiable instrument is the
8 money, which can be exchanged for legal tender to make the check good. An exchange is
9 not a loan. The bank exchanged \$100,000 for \$100,000. There was no need to go to the
10 bank for any money. The customer (alleged borrower) did not receive a loan, the alleged
11 borrower lost \$100,000 in value to the bank, which the bank kept and recorded as a bank
12 asset and never loaned any of the bank's money.
13

14 In this example, the damages are \$100,000 plus interest payments, which the bank
15 demanded by mail. The bank illegally placed a lien on the property and then threatened to
16 foreclose, further damaging the alleged borrower, if the payments were not made.
17 A depositor is owed money for the deposit and the alleged borrower is owed money for
18 the loan the bank never made and yet placed a lien on the real property demanding
19 payment.
20

21 **Damages exist in that the bank refuses to loan their money.** The bank denies the
22 alleged borrower equal protection under the law and contract, by merely exchanging one
23 currency for another and refusing repayment in the same type of currency deposited. The
24 bank refused to fulfill the contract by not loaning the money, and by the bank refusing to
25 be repaid in the same currency, which they deposited as an exchange for another currency.
26
27
28

1 A debt tender offered and refused is a debt paid to the extent of the offer. The bank has no
2 authorization to alter the alleged contract and to refuse to perform by not loaning money,
3 by changing the currency and then refusing repayment in what the bank has a written
4 policy to deposit.
5

6 The seller of the home received a check. The money deposited for the check issued
7 came from the borrower not the bank. The bank has no right to the mortgage note until the
8 bank performs by loaning the money.
9

10 In the transaction the bank was to loan legal tender to the borrower, in order for the
11 bank to secure a lien. The bank never made the loan, but kept the mortgage note the
12 alleged borrower signed. This allowed the bank to obtain the equity in the property (by a
13 lien) and transfer the wealth of the property to the bank without the bank's investment,
14 loan, or risk of money. Then the bank receives the alleged borrower's labor to pay
15 principal and Usury interest. What the people owned or should have owned debt free, the
16 bank obtained ownership in, and for free, in exchange for the people receiving a debt,
17 paying interest to the bank, all because the bank refused to loan money and merely
18 exchanged one currency for another. This places you in perpetual slavery to the bank
19 because the bank refuses to perform under the contract. The lien forces payment by threat
20 of foreclosure. The mail is used to extort payment on a contract the bank never fulfilled.
21 If the bank refuses to perform, then they must return the mortgage note. If the bank wishes
22 to perform, then they must make the loan. The past payments must be returned because the
23 bank had no right to lien the property and extort interest payments. The bank has no right
24 to sell a mortgage note for two reasons. The mortgage note was deposited and the money
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1 withdrawn without authorization by using a forged signature and; two, the contract was
2 never fulfilled. The bank acted without authorization and is involved in a fraud thereby
3 damaging the alleged borrower.
4

5 **Excerpts from "Modern Money Mechanics" Pages 3 & 6**

6 What Makes Money Valuable? In the United States neither paper currency nor deposits
7 have value as commodities. Intrinsically, a dollar bill is just a piece of paper, deposits
8 merely book entries. Coins do have some intrinsic value as metal, but generally far less
9 than face value.

10 Then, bankers discovered that they could make loans merely by giving their promises to
11 pay, or bank notes, to borrowers, in this way, banks began to create money. More notes
12 could be issued than the gold and coin on hand because only a portion of the notes
13 outstanding would be presented for payment at any one time. Enough metallic money had
14 to be kept on hand, of course, to redeem whatever volume of notes was presented for
15 payment.

16 Transaction deposits are the modern counterpart of bank notes. It was a small step from
17 printing notes to making book entries crediting deposits of borrowers, which the
18 borrowers in turn could "spend" by writing checks, thereby "printing" their own money.

19 **Notes, exchange just like checks.**

20 How do open market purchases add to bank reserves and deposits? Suppose the Federal
21 Reserve System, through its trading desk at the Federal Reserve Bank of New York, buys
22 \$10,000 of Treasury bills from a dealer in U.S. government securities. In today's world of
23 Computer financial transactions, the Federal Reserve Bank pays for the securities with an
24 "electronic" check drawn on itself. Via its "Fedwire" transfer network, the Federal Reserve
25 notifies the dealer's designated bank (Bank A) that payment for the securities should be
26 credited to (deposited in) the dealer's account at Bank A. At the same time, Bank A's
27 reserve account at the Federal Reserve is credited for the amount of the securities
28 purchased. The Federal Reserve System has added \$10,000 of securities to its assets,
which it has paid for, in effect, by creating a liability on itself in the form of bank reserve
balances. These reserves on Bank A's books are matched by \$10,000 of the dealer's
deposits that did not exist before.

If business is active, the banks with excess reserves probably will have opportunities to
loan the \$9,000. Of course, they do not really pay out loans from money they receive as
deposits. If they did this, no additional money would be created. What they do when they
make loans is to accept promissory notes in exchange for credits to the borrower's
transaction accounts. Loans (assets) and deposits (liabilities) both rise by \$9,000. Reserves
are unchanged by the loan transactions. But the deposit credits constitute new additions to
the total deposits of the banking system.

23 **PROOF BANKS DEPOSIT NOTES AND ISSUE BANK CHECKS. THE CHECKS ARE**
24 **ONLY AS GOOD AS THE PROMISSORY NOTE. NEARLY ALL BANK CHECKS**
25 **ARE CREATED FROM PRIVATE NOTES. FEDERAL RESERVE BANK NOTES**
26 **ARE A PRIVATE CORPORATE NOTE (HJR 192) WE USE NOTES TO DISCHARGE**
27 **NOTES.**

28 Excerpt from booklet Your Money, page 7:

Other M1 Money

While demand deposits, traveler's checks, and interest-bearing accounts with unlimited
checking authority are not legal tender, they are usually acceptable in payment for
purchases of goods and services.

The booklet, "Your Money", is distributed free of charge. Additional copies may be obtained by writing to: **Federal Reserve Bank of Richmond Public Services**
Department P.O. Box 27622 Richmond, Virginia 23261

CREDIT LOANS AND VOID CONTRACTS: CASE LAW

1. "In the federal courts, it is well established that a national bank has not power to lend its credit to another by becoming surety, endorser, or guarantor for him." Farmers and Miners Bank v. Bluefield Nat'l Bank, 11 F 2d 83, 271 U.S. 669.
2. "A national bank has no power to lend its credit to any person or corporation . . . Bowen v. Needles Nat. Bank, 94 F 925 36 CCA 553, certiorari denied in 20 S.Ct 1024, 176 US 682, 44 LED 637.
3. "The doctrine of ultra vires is a most powerful weapon to keep private corporations within their legitimate spheres and to punish them for violations of their corporate charters, and it probably is not invoked too often . . . Zinc Carbonate Co. v. First National Bank, 103 Wis 125, 79 NW 229. American Express Co. v. Citizens State Bank, 194 NW 430.
4. "A bank may not lend its credit to another even though such a transaction turns out to have been of benefit to the bank, and in support of this a list of cases might be cited, which-would *look like a catalog of ships*." [Emphasis added] Norton Grocery Co. v. Peoples Nat. Bank, 144 SE 505. 151 Va 195.
5. "It has been settled beyond controversy that a national bank, under federal Law being limited in its powers and capacity, cannot lend its credit by guaranteeing the debts of another. All such contracts entered into by its officers are ultra vires . . ." Howard & Foster Co. v. Citizens Nat'l Bank of Union, 133 SC 202, 130 SE 759(1926).
6. "... checks, drafts, money orders, and bank notes are not lawful money of the United States ..." State v. Neilon, 73 Pac 324, 43 Ore 168.
7. "Neither, as included in its powers not incidental to them, is it a part of a bank's business to lend its credit. If a bank could lend its credit as well as its money, it might, if it received compensation and was careful to put its name only to solid paper, make a great deal more than any lawful interest on its money would amount to. If not careful, the power would be the mother of panics, . . . Indeed; lending credit is the exact opposite of lending money, which is the real business of a bank, for while the latter creates a liability in favor of the bank, the former gives rise to a liability of the bank to another. *I Morse. Banks and Banking* 5th Ed. Sec 65; *Magee, Banks and Banking*, 3rd Ed. Sec 248." American Express Co. v. Citizens State Bank, 194 NW 429.
8. "It is not within those statutory powers for a national bank, even though solvent, to lend its credit to another in any of the various ways in which that might be done." Federal Intermediate Credit Bank v. L'Harrison, 33 F 2d 841, 842 (1929).
9. "There is no doubt but what the law is that a national bank cannot lend its credit or become an accommodation endorser." National Bank of Commerce v. Atkinson, 55 E 471.
10. "A bank can lend its money, but not its credit." First Nat'l Bank of Tallapoosa v. Monroe. 135 Ga 614, 69 SE 1124, 32 LRA (NS) 550.

- 1 11. "... The bank is allowed to hold money upon personal security; but it must be
2 money that it loans, not its credit." Seligman v. Charlottesville Nat. Bank, 3 Hughes
3 647, Fed Case No.12, 642, 1039.
- 4 12. "A loan may be defined as the delivery by one party to and the receipt by another
5 party of, a sum of money upon an agreement, express or implied, to repay the sum
6 with or without interest." Parsons v. Fox 179 Ga 605, 176 SE 644. Also see
7 Kirkland v. Bailey, 155 SE 2d 701 and United States v. Neifert White Co., 247 Fed
8 Supp 878, 879.
- 9 13. "The word 'money' in its usual and ordinary acceptance means gold, silver, or
10 paper money used as a circulating medium of exchange . . ." Lane v. Railey 280 Ky
11 319, 133 SW 2d 75.
- 12 14. "A promise to pay cannot, by argument, however ingenious, be made the equivalent
13 of actual payment ..." Christensen v. Beebe, 91 P 133, 32 Utah 406.
- 14 15. "A bank is not the holder in due course upon merely crediting the depositors
15 account." Bankers Trust v. Nagler, 229 NYS 2d 142, 143.
- 16 16. "A check is merely an order on a bank to pay money." Young v. Hembree, 73 P2d
17 393.
- 18 17. "Any false representation of material facts made with knowledge of falsity and with
19 intent that it shall be acted on by another in entering into contract, and which is so
20 acted upon, constitutes 'fraud,' and entitles party deceived to avoid contract or
21 recover damages." Barnsdall Refining Corn. v. Birnam Wood Oil Co.... 92 F 26
22 817.
- 23 18. "Any conduct capable of being turned into a statement of fact is representation.
24 There is no distinction between misrepresentations effected by words and
25 misrepresentations effected by other acts." Leonard v. Springer 197 Ill 532. 64 NE
26 301.
- 27 19. "If any part of the consideration for a promise be illegal, or if there are several
28 considerations for an unseverable promise one of which is illegal, the promise,
whether written or oral, is wholly void, as it is impossible to say what part or which
one of the considerations induced the promise." Menominee River Co. v. Augustus
Spies L & C Co., 147 Wis 559. 572; 132 NW 1122.
20. "The contract is void if it is only in part connected with the illegal transaction and
the promise single or entire." Guardian Agency v. Guardian Mut. Savings Bank,
227 Wis 550, 279 NW 83.
21. "It is not necessary for rescission of a contract that the party making the
misrepresentation should have known that it was false, but recovery is allowed
even though misrepresentation is innocently made, because it would be unjust to
allow one who made false representations, even innocently, to retain the fruits of a
bargain induced by such representations." Whipp v. Iverson, 43 Wis 2d 166.
22. "Each Federal Reserve Bank is a separate corporation owned by commercial banks
in its region ..." Lewis v. United States, 680 F 20 1239 (1982).

23. In a Debtor's RICO action against its creditor, alleging that the creditor had collected an unlawful debt, an interest rate (where all loan charges were added together) that exceeded, in the language of the RICO Statute, "twice the enforceable rate." The Court found no reason to impose a requirement that the Plaintiff show that the Defendant had been convicted of collecting an unlawful debt, running a "loan sharking" operation. The debt included the fact that exaction of a usurious interest rate rendered the debt unlawful and that is all that is necessary to support the Civil RICO action. Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank, 755 F.2d 239, Cert. denied, 473 US 906 (1985).

24. The Supreme Court found that the Plaintiff in a civil RICO action need establish only a criminal "violation" and not a criminal conviction. Further, the Court held that the Defendant need only have caused harm to the Plaintiff by the commission of a predicate offense in such a way as to constitute a "pattern of Racketeering activity." That is, the Plaintiff need not demonstrate that the Defendant is an organized crime figure, a mobster in the popular sense, or that the Plaintiff has suffered some type of special Racketeering injury; all that the Plaintiff must show is what the Statute specifically requires. The RICO Statute and the civil remedies for its violation are to be liberally construed to affect the congressional purpose as broadly formulated in the Statute. Sedima, SPRL v. Imrex Co., 473 US 479 (1985).

DEFINITIONS TO KNOW WHEN EXAMINING A BANK CONTRACT

1. **BANK ACCOUNT:** A sum of money placed with a bank or banker, on deposit, by a customer, and subject to be drawn out on the latter's check.
2. **BANK:** whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans and issue promissory notes payable to bearer, known as bank notes.
3. **BANK CREDIT:** A credit with a bank by which, on proper credit rating or proper security given to the bank, a person receives liberty to draw to a certain extent agreed upon.
4. **BANK DEPOSIT:** Cash, checks or drafts placed with the bank for credit to depositor's account. Placement of money in bank, thereby, creating contract between bank and depositors.
5. **DEMAND DEPOSIT:** The right to withdraw deposit at any time.
6. **BANK DEPOSITOR:** One who delivers to, or leaves with a bank a sum of money subject to his order.
7. **BANK DRAFT:** A check, draft or other form of payment.
8. **BANK OF ISSUE-** Bank with the authority to issue notes which are intended to circulate as currency.
9. **LOAN:** Delivery by one party to, and receipt by another party, a sum of money upon agreement, express or implied, to repay it with or without interest.
10. **CONSIDERATION:** The inducement to a contract. The cause, motive, price or impelling influences, which induce a contracting party to enter into a contract. The reason or material cause of a contract. (See illegal consideration and impossible consideration.)

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11. **check-** A draft drawn upon a bank and payable on demand, signed by the maker or drawer, containing an unconditional promise to pay a certain sum in money to the order of the payee. The Federal Reserve Board defines a check as, "*...a draft or order upon a bank or banking house purporting to be drawn upon a deposit of funds for the payment at all events of, a certain sum of money to a certain person therein named, or to him or his order, or to bearer and payable instantly on demand of.*"

QUESTIONS ONE MIGHT ASK THE BANK IN AN INTERROGATORY

1. Did the bank loan gold or silver to the alleged borrower?
2. Did the bank loan credit to the alleged borrower?
3. Did the borrower sign any agreement with the bank, which prevents the borrower from repaying the bank in credit?
4. Is it true that your bank creates check book money when the bank grants loans, simply by adding deposit dollars to accounts on the bank's books, in exchange, for the borrower's mortgage note?
5. Has your bank, at any time, used the borrower's mortgage note, "promise to pay", as a deposit on the bank's books from which to issue bank checks to the borrower?
6. At the time of the loan to the alleged borrower, was there one dollar of Federal Reserve Bank Notes in the bank's possession for every dollar owed in Savings Accounts, Certificates of Deposits and check Accounts (Demand Deposit Accounts) for every dollar of the loan?
7. According to the bank's policy, is a promise to pay money the equivalent of money?
8. Does the bank have a policy to prevent the borrower from discharging the mortgage note in "like kind funds" which the bank deposited from which to issue the check?
9. Does the bank have a policy of violating the Deceptive Trade Practices Act?
10. When the bank loan officer talks to the borrower, does the bank inform the borrower that the bank uses the borrowers mortgage note to create the very money the bank loans out to the borrower?
11. Does the bank have a policy to show the same money in two separate places at the same time?
12. Does the bank claim to loan out money or credit from savings and certificates of deposits while never reducing the amount of money or credit from savings accounts or certificates of deposits, which customers can withdraw from?
13. Using the banking practice in place at the time the loan was made, is it theoretically possible for the bank to have loaned out a percentage of the Savings Accounts and Certificates of Deposits?
14. If the answer is "no" to question #13, explain why the answer is no.

- 1 15. In regards to question #13, at the time the loan was made, were there enough
2 Federal Reserve Bank Notes on hand at the bank to match the figures represented
3 by every Savings Account and Certificate of Deposit and checking Account
4 (Demand Deposit Account)?
- 5 16. Does the bank have to obey, the laws concerning, Commercial Paper; Commercial
6 Transactions, Commercial Instruments, and Negotiable Instruments?
- 7 17. Did the bank lend the borrower the bank's assets, or the bank's liabilities?
- 8 18. What is the complete name of the banking entity, which employs you, and in what
9 jurisdiction is the bank chartered?
- 10 19. What is the bank's definition of "Loan Credit"?
- 11 20. Did the bank use the borrowers assumed mortgage note to create new bank money,
12 which did not exist before the assumed mortgage note was signed?
- 13 21. Did the bank take money from any Demand Deposit Account (DDA), Savings
14 Account (SA), or a Certificate of Deposit (CD), or any combination of any DDA,
15 SA or CD, and loan this money to the borrower?
- 16 22. Did the bank replace the money or credit, which it loaned to the borrower with the
17 borrower's assumed mortgage note?
- 18 23. Did the bank take a bank asset called money, or the credit used as collateral for
19 customers' bank deposits, to loan this money to the borrower, and/or did the bank
20 use the borrower's note to replace the asset it loaned to the borrower?
- 21 24. Did the money or credit, which the bank claims to have loaned to the borrower,
22 come from deposits of money or credit made by the bank's customers, excluding
23 the borrower's assumed mortgage note?
- 24 25. Considering the balance sheet entries of the bank's loan of money or credit to the
25 borrower, did the bank directly decrease the customer deposit accounts (i.e. DDA,
26 SA, and CD) for the amount of the loan?
- 27 26. Describe the bookkeeping entries referred to in question #13.
- 28 27. Did the bank's bookkeeping entries to record the loan and the borrower's assumed
mortgage note ever, at any time, directly decrease the amount of money or credit
from any specific bank customer's deposit account?
- 28 28. Does the bank have a policy or practice to work in cooperation with other banks or
financial institutions use borrower's mortgage note as collateral to create an
offsetting amount of new bank money or credit or check book money or DDA
generally to equal the amount of the alleged loan?
- 29 29. Regarding the borrowers assumed mortgage loan, give the name of the account
which was debited to record the mortgage.
- 30 30. Regarding the bookkeeping entry referred to in Interrogatory #17 states the name
and purpose of the account, which was credited.

- 1 31. When the borrower's assumed mortgage note was debited as a bookkeeping entry,
2 was the offsetting entry a credit account?
- 3 32. Regarding the initial bookkeeping entry to record the borrower's assumed mortgage
4 note and the assumed loan to the borrower, was the bookkeeping entry credited for
5 the money loaned to the borrower, and was this credit offset by a debit to record the
6 borrower's assumed mortgage note?
- 7 33. Does the bank currently or has it ever at anytime used the borrower's assumed
8 mortgage note as money to cover the bank's liabilities referred to above, i.e. DDA,
9 SA and CD?
- 10 34. When the assumed loan was made to the borrower, did the bank have every DDA,
11 SA, and CD backed up by Federal Reserve Bank Notes on hand at the bank?
- 12 35. Does the bank have an established policy and practice to emit bills of credit which
13 it creates upon its books at the time of making a loan agreement and issuing money
14 or so-called money of credit, to its borrowers?

SUMMARY OF THIS SECTION

15 The bank advertised it would loan money, which is backed by legal tender. Is not
16 that what the symbol \$ means? Is that not what the contract said? Do you not know there
17 is no agreement or contract in the absence of mutual consent? The bank may say that they
18 gave you a check, you owe the bank money. This information shows you that the check
19 came from the money the alleged borrower provided and the bank never loaned any
20 money from other depositors.

21 I've shown you the law and the bank's own literature to prove my case. All the
22 bank did was trick you. They get your mortgage note without investing one cent, by
23 making you a depositor and not a borrower. **The key to the puzzle is, the bank did not
24 sign the contract. If they did they must loan you the money. If they did not sign it,
25 chances are, they deposited the mortgage note in a checking account and used it to
26 issue a check without ever loaning you money or the bank investing one cent.**

27 Our Nation, along with every State of the Union, entered into Bankruptcy, in 1933.
28 This changes the law from "gold and silver" legal money and "common law" to the law of

1 bankruptcy. Under Bankruptcy law the mortgage note acts like money. Once you sign the
2 mortgage note it acts like money. The bankers now trick you into thinking they loaned you
3 legal tender, when they never loaned you any of their money.
4

5 The trick is they made you a depositor instead of a borrower. They deposited your
6 mortgage note and issued a bank check. **Neither the mortgage note nor the check is**
7 **legal tender.** The mortgage note and the check are now money created that never existed,
8 prior. The bank got your mortgage note for free without loaning you money, and sold the
9 mortgage note to make the bank check appear legal. The borrower provided the legal
10 tender, which the bank gave back in the form of a check. If the bank loaned legal tender,
11 **as the contract says,** for the bank to legally own the mortgage note, then the people
12 would still own the homes, farms, businesses and cars, nearly debt free and pay little, if
13 any interest. **By the banks not fulfilling the contract by loaning legal tender, they**
14 **make the alleged borrower, a depositor. This is a fraudulent conversion of the**
15 **mortgage note. A Fraud is a felony.**
16
17

18 The bank had no intent to loan, making it promissory fraud, mail fraud, wire fraud,
19 and a list of other crimes a mile long. How can they make a felony, legal? They cannot!
20 Fraud is fraud!
21

22 The banks deposit your mortgage note in a checking account. The deposit becomes
23 the bank's property. They withdraw money without your signature, and call the money,
24 the banks money that they loaned to you. The bank forgot one thing. If the bank deposits
25 your mortgage note, then the bank must credit your checking account claiming the bank
26 owes you \$100,000 for the \$100,000 mortgage note deposited. The credit of \$100,000 the
27
28

1 bank owes you for the deposit allows you to write a check or receive cash. They did not
2 tell you they deposited the money, and they forget to tell you that the \$100,000 is money
3 the banks owe you, not what you owe the bank. You lost \$100,000 and the bank gained
4 \$100,000. For the \$100,000 the bank gained, the bank received government bonds or cash
5 of \$100,000 by selling the mortgage note. For the loan, the bank received \$100,000 cash,
6 the bank did not give up \$100,000.
7

8 Anytime the bank receives a deposit, the bank owes you the money. You do not
9 owe the bank the money.
10

11 If you or I deposit anyone's negotiable instrument without a contract authorizing it,
12 and withdraw the money claiming it is our money, we would go to jail. If it was our policy
13 to violate a contract, we could go to jail for a very long time. You agreed to receive a loan,
14 not to be a depositor and have the bank receive the deposit for free. What the bank got for
15 free (lien on real property) you lost and now must pay with interest.
16

17 If the bank loaned us legal tender (other depositors' money) to obtain the mortgage
18 note the bank could never obtain the lien on the property for free. By not loaning their
19 money, but instead depositing the mortgage note the bank creates inflation, which costs
20 the consumer money. Plus the economic loss of the asset, which the bank received for
21 free, in direct violation of any signed agreement.
22

23 We want equal protection under the law and contract, and to have the bank fulfill
24 the contract or return the mortgage note. **We want the judges, sheriffs, and lawmakers**
25 **to uphold their oath of office and to honor and uphold the founding fathers U.S.**
26 **Constitution. Is this too much to ask?**
27
28

1 What is the mortgage note? The mortgage note represents your future loan
2 payments. A promise to pay the money the bank loaned you. What is a lien? The lien is a
3 security on the property for the money loaned.
4

5 How can the bank promise to pay money and then not pay? How can they take a
6 promise to pay and call it money and then use it as money to purchase the future payments
7 of money at interest? Interest is the compensation allowed by law or fixed by the parties
8 for the use or forbearance of borrowed money. The bank never invested any money to
9 receive **your** mortgage note. What is it they are charging interest on?
10

11 The bank received an asset. They never gave up an asset. Did they pay interest on
12 the money they received as a deposit? A check issued on a deposit received from the
13 borrower cost the bank nothing? Where did the money come from that the bank invested
14 to charge interest on?
15

16 The bank may say we received a benefit. What benefit? Without their benefit we
17 would receive equal protection under the law, which would mean we did not need to give
18 up an asset or pay interest on our own money! Without their benefit we would be free and
19 not enslaved. We would have little debt and interest instead of being enslaved in debt and
20 interest. The banks broke the contract, which they never intended to fulfill in the first
21 place. We got a check and a house, while they received a lien and interest for free, through
22 a broken contract, while we got a debt and lost our assets and our country. The benefit is
23 the banks, who have placed liens on nearly every asset in the nation, without costing the
24 bank one cent. Inflation and working to pay the bank interest on our own money is the
25 benefit. Some benefit! **What a Shell Game. The Following case (next pages between**
26
27
28

1 "start" - "end" highlighted in yellow) was an actual trial concerning the issues we
2 have covered. The Judge was extraordinary in-that he had a grasp of the
3 Constitution that I haven't seen often enough in our courts. This is the real thing,
4 absolutely true. This case was reviewed by the Minnesota Supreme Court on their
5 own motion. The last thing in the world that the Bankers and the Judges wanted was
6 case law in favor against the Bankers. However, this case law is real.
7

8 **STATE OF MINNESOTA IN JUSTICE COURT COUNTY OF SCOTT**
9 **TOWNSHIP OF CREDIT RIVER CASE NO: 19144**
10 **MARTIN V. MAHONEY, JUSTICE**
11 **FIRST BANK OF MONTGOMERY, Plaintiff, Vs. Jerome Daly, Defendant.**
12 **JUDGMENT AND DECREE**

13 The above entitled action came on before the court and a jury of 12 on December 7, 1968
14 at 10:00 a.m. Plaintiff appeared by its President Lawrence V. Morgan and was represented
15 by its Counsel Theodore R. Mellby, Defendant appeared on his own behalf

16 A jury of Talesmen were called, impaneled and sworn to try the issues in this case.
17 Lawrence V. Morgan was the only witness called for plaintiff and defendant testified as
18 the only witness in his own behalf

19 Plaintiff brought this as a Common Law action for the recovery of the possession of lot
20 19, Fairview Beach, Scott County, Minn. Plaintiff claimed titled to the Real Property in
21 question by foreclosure of a Note and Mortgage Deed dated May 8, 1964 which plaintiff
22 claimed was in default at the time foreclosure proceedings were started. Defendant
23 appeared and answered that the plaintiff created the money and credit upon its own books
24 by bookkeeping entry as the legal failure of consideration for the Mortgage Deed and
25 alleged that the Sheriff's sale passed no title to plaintiff. The issues tried to the jury were
26 whether there was a lawful consideration and whether Defendant had waived his rights to
27 complain about the consideration having paid on the note for almost 3 years. Mr. Morgan
28 admitted that all of the money or credit which was used as a consideration was created
upon their books that this was standard banking practice exercised by their bank in
combination with the Federal Reserve Bank of Minneapolis, another private bank, further
that he knew of no United States Statute of Law that gave the Plaintiff the authority to do

1 this. Plaintiff further claimed that Defendant by using the ledger book created credit and
2 by paying on the Note and Mortgage waived any right to complain about the consideration
3 and that Defendant was estopped from doing so. At 12:15 on December 7, 1968 the Jury
4 returned a unanimous verdict for the Defendant. Now therefore by virtue of the authority
5 vested in me pursuant to the Declaration of Independence, the Northwest Ordinance of
6 1787, the Constitution of the United States and the Constitution and laws of the State
7 Minnesota not inconsistent therewith.

8 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED**

- 9 1. That Plaintiff is not entitled to recover the possession of lot 19, Fairview Beach,
10 Scott County, Minnesota according to the plat thereof on file in the Register of
11 Deeds office. That because of failure of a lawful consideration the note and
12 Mortgage dated May 8, 1964 is null and void.
13 2. That the Sheriffs sale of the above described premises held on June 26, 1967 is null
14 and void, of no effect.
15 3. That Plaintiff has no right, title or interest in said premises or lien thereon, as is
16 above described.
17 4. That any provision in the Minnesota Constitution and any Minnesota Statute
18 limiting the Jurisdiction of this Court is repugnant to the Constitution of the United
19 States and to the Bill of Rights of the Minnesota Constitution and is null and void
20 and that this Court has Jurisdiction to render complete Justice in this cause.
21 5. That Defendant is awarded costs in the sum of \$75.00 and execution is hereby
22 issued therefore.
23 6. A 10 day stay is granted.

24 The following memorandum and any supplemental memorandum made and filed by this
25 Court in support of this judgment is hereby made a part hereof by reference.

26 BY THE COURT

27 Dated December 9, 1969

28 MARTIN V. MAHONEY

Justice of the Peace Credit River Township Scott County, Minnesota

MEMORANDUM

1 The issues in this case were simple. There was no material dispute on the facts for the jury
2 to resolve. Plaintiff admitted that it, in combination with the Federal Reserve Bank of
3 Minneapolis, which are for all practical purposes because of their interlocking activity and
4 practices, and both being Banking Institutions Incorporated under the laws of the United
5 States, are in the Law to be treated as one and the same Bank, did create the entire
6 \$14,000.00 in money or credit upon its own books by bookkeeping entry. That this was
7 the Consideration used to support the Note dated May 8, 1964 and the Mortgage of the
8 same date. The Money and credit first came into existence when they credited it. Mr.
9 Morgan admitted that no United States Law of Statute existed which gave him the right to
10 do this. A lawful consideration must exist and be tendered to support the note. (See
11 Anheuser Busch Brewing Co. v. Emma Mason, 44 Minn. 318, 46 NW 558.) The Jury
12 found there was no lawful consideration and I agree Only God can create something of
13 value out of nothing. Even if defendant could be charged with waiver or estoppel as a
14 matter of law this is no defense to the plaintiff. The law leaves wrongdoers where it finds
15 them. (See sections 50, 51, and 52 of Am Jur 2d "Actions" on page 584.) No action will
16 lie to recover on a claim based upon, or in any manner depending upon, a fraudulent,
17 illegal, or immoral transaction or contract to which plaintiff was a party. Plaintiffs act of
18 creating is not authorized by the Constitution and Laws of the United States, is
19 unconstitutional and void, and is not lawful consideration in the eyes of the law to support
20 anything or upon which any lawful rights can be built. Nothing in the Constitution of the
21 United States limits the jurisdiction of this Court, which is one of original jurisdiction with
22 right of trial by jury guaranteed. This is a Common Law Action. Minnesota cannot limit or
23 impair the power of this Court to render complete justice between the parties. Any
24 provisions in the Constitution and laws of Minnesota which attempt to do so is repugnant
25 to the Constitution of the United States and void. No question as to the Jurisdiction of this
26 Court was raised by either party at the trial. Both parties were given complete liberty to
27 submit any and all facts and law to the jury, at least in so far as they saw it. No complaint
28 was made by Plaintiff that Plaintiff did not receive a fair trial. From the admissions made
by Mr. Morgan the path of duty was made direct and clear for the jury. Their verdict could

1 not reasonably have been otherwise. Justice was rendered completely and without
2 purchase, conformable to the law in this Court on December 7, 1968.

3 **BY THE COURT**

4 **MARTIN V. MAHONEY**

5 **Justice of the Peace Credit River Township Scott County, Minnesota**

6 **Note:** It has never been doubted that a note given on a consideration, which is prohibited
7 by law is void. It has been determined independent of Acts of Congress, that sailing under
8 the license of an enemy is illegal. The emission of Bills of Credit upon the books of these
9 private Corporations for the purposes of private gain is not warranted by the Constitution
10 of the United States and is unlawful. See Craig v. @ 4 peters reports 912, This Court can
11 tread only that path which is marked out by duty. M.V.M.

12 **JUDGE MARTIN MAHONEY DECISION WAS AS FOLLOWS**

13 "For the Justice's fees, the First National Bank deposited @ the Clerk of the District Court
14 the two Federal Reserve Bank Notes. The Clerk tendered the Notes to me (the Judge). As
15 Judge my sworn duty compelled me to refuse the tender. This is contrary to the
16 Constitution of the United States. The States have no power to make bank notes a legal
17 tender. Only gold and silver coin is a lawful tender." (See American Jurist on Money 36
18 sec. 13.)

19 "Bank Notes are a good tender as money unless specifically objected to. Their consent and
20 usage is based upon the convertibility of such notes to coin at the pleasure of the holder
21 upon presentation to the bank for redemption. When the inability of a bank to redeem its
22 notes is openly avowed they instantly lose their character as money and their circulation as
23 currency ceases." (See American Jurist 36-section 9). "There is no lawful consideration for
24 these Federal Reserve Bank Notes to circulate as money. The banks actually obtained
25 these notes for cost of printing - A lawful consideration must exist for a Note. As a matter
26 of fact, the "Notes" are not Notes at all, as they contain no promise to pay." (See 17
27 American Jurist section 85, 215) "The activity of the Federal Reserve Banks of Minnesota,
28 San Francisco and the First National Bank of Montgomery is contrary to public policy and
contrary to the Constitution of the United States, and constitutes an unlawful creation of
money, credit and the obtaining of money and credit for no valuable consideration.

1 Activity of said banks in creating money and credit is not warranted by the Constitution of
2 the United States." "The Federal Reserve Banks and National Banks exercise an exclusive
3 monopoly and privilege of creating credit and issuing Notes at the expense of the public
4 which does not receive a fair equivalent. This scheme is obliquely designed for the benefit
5 of an idle monopoly to rob, blackmail, and oppress the producers of wealth. "The Federal
6 Reserve Act and the National Bank Act are, in their operation and effect, contrary to the
7 whole letter and spirit of the Constitution of the United States, for they confer an unlawful
8 and unnecessary power on private parties; they hold all of our fellow citizens in
9 dependence; they are subversive to the rights and liberation of the people." "These Acts
10 have defiled the lawfully constituted Government of the United States. The Federal
11 Reserve Act and the National Banking Act are not necessary and proper for carrying into
12 execution the legislative powers granted to Congress or any other powers vested in the
13 Government of the United States, but on the contrary, are subversive to the rights of the
14 People in their rights to life, liberty, and property." (See Section 462 of Title 31 U. S.
Code).

15 "The meaning of the Constitutional provision, 'NO STATE SHALL make anything but
16 Gold and Silver Coin a legal tender ' payment of debts' is direct, clear, unambiguous and
17 without any qualification. This Court is without authority to interpolate any exception. My
18 duty is simply to execute it, as and to pronounce the legal result. From an examination of
19 the case of Edwards v. Kearsey, Federal Reserve Bank Notes (fiat money) which are
20 attempted to be made a legal tender, are exactly what the authors of the Constitution of the
21 United States intend to prohibit. No State can make these Notes a legal tender. Congress is
22 incompetent to authorize a State to make the Notes a legal tender. For the effect of binding
23 Constitution provisions see Cooke v. Iverson. This fraudulent Federal Reserve System and
24 National Banking System has impaired the obligation of Contract promoted disrespect for
25 the Constitution and Law and has shaken society to its foundation." (See 96 U.S. Code
595 and 108 M 388 and 63 M 147)

26 "Title 31, U.S. Code, Section 432, is in direct conflict with the Constitution insofar, at
27 least, that it attempts to make Federal Reserve Bank Notes a legal tender. The Constitution
28 is the Supreme Law of the Land. Section 462 of Title 31 is not a law, which is made in

1 pursuance of the Constitution. It is unconstitutional and void, and I so hold. Therefore, the
2 two Federal Reserve Bank Notes are Null and Void for any lawful purpose in so far as this
3 case is concerned and are not a valid deposit of \$2.00 with the Clerk of the District Court
4 for the purpose of effecting an Appeal from this Court to the District Court." "However, of
5 these Federal Reserve Bank Notes, previously discussed, and that is that the Notes are
6 invalid, because of a theory that they are based upon a valid, adequate or lawful
7 consideration. At the hearing scheduled for January 22, 1969, at 7:00 P.M., Mr. Morgan
8 appeared at the trial; he appeared as a witness to be candid, open, direct, experienced and
9 truthful. He testified to years of experience with the Bank of America in Los Angeles, the
10 Marquette National Bank of Minnesota and the First National Bank of Minnesota. He
11 seemed to be familiar with the operation of the Federal Reserve System. He freely
12 admitted that his Bank created all of the money and credit upon its books with which it
13 acquired the Note and Mortgage of May 8, 1964. The credit first came into existence when
14 the Bank created it upon its books. Further, he freely admitted that no United States Law
15 gave the Bank the authority to do this. This was obviously no lawful consideration for the
16 Note.

16 The Bank parted with absolutely nothing except a little ink. In this case, the evidence was
17 on January 22, 1969 that the Federal Reserve Bank obtained the Notes for this seems to be
18 conferred by Title 12 USC Section 420. The cost is about 9/10th of a cent per Note
19 regardless of the amount of the Note. The Federal Reserve Banks create all of the money
20 and credit upon their books by bookkeeping entries by which they acquire United States
21 Securities. The collateral required to obtain the Note is, by section 412 USC, Title 12, a
22 deposit of a like amount of bonds. Bonds which the Banks acquire by creating money and
23 credit by bookkeeping entry."

23 "No rights can be acquired by fraud. The Federal Reserve Bank Notes are acquired
24 through the use of unconstitutional statutes and fraud." "The Common Law requires a
25 lawful consideration for any contract or Note. These Notes are void for failure at a lawful
26 consideration at Common Law, entirely apart from any Constitutional consideration. Upon
27 this ground, the Notes are ineffectual for any purpose. This seems to be the principal
28 objection to paper fiat money and the cause of its depreciation and failure down through

1 the ages. If allowed to continue, Federal Reserve Bank Notes will meet the same fate.
2 From the evidence introduced on January 22, 1969, this Court finds that as of March 18,
3 1969, all Gold and Silver backing is removed from Federal Reserve Bank Notes." "The
4 law leaves wrongdoers where it finds them. (See I Mer. Jur 2nd on Actions Section
5 550)."Slavery and all its incidents, including Peonage, thralldom, and debt created by
6 fraud is universally prohibited in the United States. This case represents but another
7 refined form of Slavery by the Bankers. Their position is not supported by the Constitution
8 of the United States. The People have spoken their will in terms, which cannot be
9 misunderstood. It is indispensable to the preservation of the Union and independence and
10 liberties of the people that this Court, adhere only to the mandate of the Constitution and
11 administer it as it is written. I, therefore, hold these Notes in question void and not
12 effectual for any purpose." (4) January 30, 1969

13 Judge Martin V. Mahoney

14 Justice of the Peace Credit River Township

15 **CREDIT LOANS AND VOID CONTRACTS PERFECT**
OBLIGATION AS TO A HUMAN BEING AS TO A BANK

16 Furthermore, Plaintiff, is offering this Memorandum of law in order for the Court
17 to advance it's understanding of the complex legal issues, present and embodied in the
18 Common Law, with authorities, law and cases in support of, which will constitute the
19 following facts:

20 Defendant and other privately owned banks are making loans of "credit" with the intended
21 purpose of circulating "credit" as "money". Other financial institutions and individuals
22 may "launder" bank credit that they receive directly or indirectly from privately owned
23 banks. This collective activity is unconstitutional, unlawful, in violation of Common Law,
24 U.S. Code and the principles of equity. Such activity and underlying contracts have long
25 been held void, by State Courts, Federal Courts and the U.S. Supreme Court. This
26
27
28

1 Memorandum will demonstrate through authorities and established common law, that
2 credit "money creation" by privately owned bank corporations is not really "money
3 creation" at all. It is the trade specialty and artful illusion of law merchants, which use old-
4 time trade secrets of the Goldsmiths, to entrap the borrower and unjustly enrich the lender
5 through usury and other unlawful techniques. Issues based on law and the principles of
6 equity, which are within the jurisdiction of this Court, will be addressed.

7 THE GOLDSMITHS

8
9 In his book, *Money and Banking* (8th Edition, 1984), Professor David R.
10 Kamerschen writes on pages 56 -63: "The first bankers in the modern sense were the
11 goldsmiths, who frequently accepted bullion and coins for storage ... One result was that
12 the goldsmiths temporarily could lend part of the gold left with them . . . These loans of
13 their customers' gold were soon replaced by a revolutionary technique. When people
14 brought in gold, the goldsmiths gave them notes promising to pay that amount of gold on
15 demand. The notes, first made payable to the order of the individual, were later changed to
16 bearer obligations. In the previous form, a note payable to the order of Jebidiah Johnson
17 would be paid to no one else unless Johnson had first endorsed the note ... But notes were
18 soon being used in an unforeseen way. The note holders found that, when they wanted to
19 buy something, they could use the note itself in payment more conveniently and let the
20 other person go after the gold, which the person rarely did ... The specie, then tended to
21 remain in the goldsmiths' vaults. . . . The goldsmiths began to realize that they might profit
22 handsomely by issuing somewhat more notes than the amount of specie they held. . .
23 These additional notes would cost the goldsmiths nothing except the negligible cost of
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1 printing them, yet the notes provided the goldsmiths with funds to lend at interest . . . And
2 they were to find that the profitability of their lending operations would exceed the profit
3 from their original trade. The goldsmiths became bankers as their interest in manufacture
4 of gold items to sell was replaced by their concern with credit policies and lending
5 activities . . . They discovered early that, although an unlimited note issue would be
6 unwise, they could issue notes up to several times the amount of specie they held. The key
7 to the whole operation lay in the public's willingness to leave gold and silver in the bank's
8 vaults and use the bank's notes. This discovery is the basis of modern banking: On page
9 74, Professor Kamerschen further explains the evolution of the credit system: "Later the
10 goldsmiths learned a more efficient way to put their credit money into circulation. They
11 lent by issuing additional notes, rather than by paying out in gold. In exchange for the
12 interest-bearing note received from their customer (in effect, the loan contract), they gave
13 their own non-interest bearing note. Each was actually borrowing from the other ... The
14 advantage of the later procedure of lending notes rather than gold was that . . . more notes
15 could be issued if the gold remained in the vaults ... Thus, through the principle of bank
16 note issuance, *banks learned to create money in the form of their own liability.*" [Emphasis
17 Added]

22 MODERN MONEY MECHANICS

23 Another publication which explains modern banking as learned from the
24 Goldsmiths is *Modern Money Mechanics* (5th edition 1992), published by the Federal
25 Reserve Bank of Chicago which states beginning on page 3: "It started with the
26 goldsmiths ..." At one time, bankers were merely middlemen. They made a profit by
27
28

1 accepting gold and coins brought to them for safekeeping and lending the gold and coins
2 to borrowers. But the goldsmiths soon found that the receipts they issued to depositors
3 were being used as a means of payment. "Then, bankers discovered that they could make
4 loans merely by giving borrowers their promises to pay, or bank notes... In this way,
5 banks began to create money ... Demand deposits are the modern counterpart of bank
6 notes . . . It was a small step from printing notes to making book entries to the credit of
7 borrowers which the borrowers, in turn, could 'spend' by writing checks, thereby printing
8 *their own money.*" [Emphasis added]
9

11 HOW BANKS CREATE MONEY

12 In the modern sense, banks create money by creating "demand deposits." Demand
13 deposits are merely "book entries" that reflect how much lawful money the bank owes its
14 customers. Thus, all deposits are called demand deposits and are the bank's liabilities. The
15 bank's assets are the vault cash plus all the "IOUs" or promissory notes that the borrower
16 signs when they borrow either money or credit. When a bank lends its cash (legal money),
17 it loans its assets, but when a bank lends its "credit" it lends its liabilities. The lending of
18 credit is, therefore, the exact opposite of the lending of cash (legal money).
19

21 At this point, we need to define the meaning of certain words like "lawful money",
22 "legal tender", "other money" and "dollars". The terms "Money" and "Tender" had their
23 origins in Article 1, Sec. 8 and Article 1, Sec. 10 of the *Constitution of the United States*.
24 12 U.S.C. §152 refers to "gold and silver coin as lawful money of the United States" and
25 was unconstitutionally repealed in 1994 in-that Congress **can not delegate** any portion of
26 their constitutional responsibility without Amendment. The term "legal tender" was
27
28

1 originally cited in 31 U.S.C.A. §392 and is now re-codified in 31 U.S.C.A. §5103 which
2 states: "United States coins and currency . . . are legal tender for all debts, public charges,
3 taxes, and dues." The common denominator in both "lawful money" and "legal tender
4 money" is that the United States Government issues both.
5

6 With Bankers, however, we find that there are two forms of money - one is
7 government-issued, and privately owned banks such as Defendant, (Name of Bank) Bank,
8 issue the other. As we have already discussed government issued forms of money, we
9 must now scrutinize privately issued forms of money.
10

11 All privately issued forms of money today are based upon the liabilities of the
12 issuer. There are three common terms used to describe this privately created money. They
13 are "credit", "demand deposits" and "checkbook money". In the Sixth edition of Blacks
14 Law Dictionary, p.367 under the term "Credit" the term "Bank credit" is described as:
15 "Money bank owes or will lend a individual or person". It is clear from this definition that
16 "Bank credit" which is the "money bank owes" is the bank's liability. The term
17 "checkbook money" is described in the book *"I Bet You Thought"*, published by the
18 privately owned Federal Reserve Bank of New York, as follows: "Commercial banks
19 create checkbook money whenever they grant a loan, simply by adding deposit dollars to
20 accounts on their books to exchange for the borrowers IOU" The word "deposit" and
21 "demand deposit" both mean the same thing in bank terminology and refer to the bank's
22 liabilities. For example, the Chicago Federal Reserves publication, *"Modern Money
23 Mechanics"* states: "Deposits are merely book entries ... Banks can build up deposits by
24 increasing loans ... Demand deposits are the modern counterpart of bank notes. It was a
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1 small step from printing notes to making book entries to the credit of borrowers which the
2 borrowers, in turn, could 'spend' by writing checks. Thus, it is demonstrated in "Modern
3 Money Mechanics" how, under the practice of fractional reserve banking, a deposit of
4 \$5,000 in cash could result in a loan of credit/checkbook money/demand deposits of
5 \$100,000 if reserve ratios set by the Federal Reserve are 5% (instead of 10%).
6

7 In a practical application, here is how it works. If a bank has ten people who each
8 deposit \$5,000 (totaling \$50,000) in cash (legal money) and the bank's reserve ratio is 5%,
9 then the bank will lend twenty times this amount, or \$1,000,000 in "credit" money. What
10 the bank has actually done, however, is to write a check or loan its credit with the intended
11 purpose of circulating credit as "money." Banks know that if all the people who receive a
12 check or credit loan come to the bank and demand cash, the bank will have to close its
13 doors because it doesn't have the cash to back up its check or loan. The bank's check or
14 loan will, however, pass as money as long as people have confidence in the illusion and
15 don't demand cash. Panics are created when people line up at the bank and demand cash
16 (legal money), causing banks to fold as history records in several time periods, the most
17 recent in this country was the panic of 1933.
18
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20

21 **THE PROCESS OF PASSING CHECKS OR**
22 **CREDIT AS MONEY IS DONE QUITE SIMPLY**

23 A deposit of \$5,000 in cash by one person results in a loan of \$100,000 to another
24 person at 5% reserves. The person receiving the check or loan of credit for \$100,000
25 usually deposits it in the same bank or another bank in the Federal Reserve System. The
26 check or loan is sent to the bookkeeping department of the lending bank where a book
27 entry of \$100,000 is credited to the borrower's account. The lending bank's check that
28

1 created the borrower's loan is then stamped "Paid" when the account of the borrower is
2 credited a "dollar" amount. The borrower may then "spend" these book entries (demand
3 deposits) by writing checks to others, who in turn deposit their checks and have book
4 entries transferred to their account from the borrower's checking account. However, two
5 highly questionable and unlawful acts have now occurred. The first was when the bank
6 wrote the check or made the loan with insufficient funds to back them up. The second is
7 when the bank stamps its own "Not Sufficient Funds" check "paid" or posts a loan by
8 merely crediting the borrower's account with book entries the bank calls "dollars."
9
10 Ironically, the check or loan seems good and passes as money -- unless an emergency
11 occurs via demands for cash - or a Court challenge -- and the artful, illusion bubble,
12 bursts.
13

14 DIFFERENT KINDS OF MONEY

15
16 The book, "*I Bet You Thought*", published by the Federal Reserve Bank of New
17 York, states: "Money is any generally accepted medium of exchange, not simply coin and
18 currency. Money *doesn't* have to be intrinsically valuable, *be issued by a government* or be
19 in any special form." [Emphasis added] Thus we see that privately issued forms of money
20 only require public confidence in order to pass as money. Counterfeit money also passes
21 as money as long as nobody discovers it's counterfeit. Like wise, "bad" checks and
22 "credit" loans pass as money so long as no one finds out they are unlawful. Yet, once the
23 fraud is discovered, the values of such "bank money" like bad check's ceases to exist.
24
25 There are, therefore, two kinds of money -- government issued legal money and privately
26 issued unlawful money.
27
28

DIFFERENT KINDS OF DOLLARS

The dollar once represented something intrinsically valuable made from gold or silver. For example, in 1792, Congress defined the silver dollar as a silver coin containing 371.25 grains of pure silver. The legal dollar is now known as "United States coins and currency." However, the Banker's dollar has become a unit of measure of a different kind of money. Therefore, with Bankers there is a "dollar" of coins and a dollar of cash (legal money), a "dollar" of debt, a "dollar" of credit, a "dollar" of checkbook money or a "dollar" of checks. When one refers to a dollar spent or a dollar loaned, he should now indicate what kind of "dollar" he is talking about, since Bankers have created so many different kinds.

A dollar of bank "credit money" is the exact opposite of a dollar of "legal money". The former is a liability while the latter is an asset. Thus, it can be seen from the earlier statement quoted from *I Bet You Thought*, that money can be privately issued as: "Money doesn't have to ... be issued by a government or be in any special form." It should be carefully noted that banks that issue and lend privately created money demand to be paid with government issued money. However, payment in like kind under natural equity would seem to indicate that a debt created by a loan of privately created money can be paid with other privately created money, without regard for "any special form" as there are no statutory laws to dictate how either private citizens or banks may create money.

BY WHAT AUTHORITY?

By what authority do state and national banks, as privately owned corporations, create money by lending their credit --or more simply put - by writing and passing "bad"

1 checks and "credit" loans as "money"? Nowhere can a law be found that gives banks the
2 authority to create money by lending their liabilities.

3 Therefore, the next question is, if banks are creating money by passing bad checks
4 and lending their credit, where is their authority to do so? From their literature, banks
5 claim these techniques were learned from the trade secrets of the Goldsmiths. It is evident;
6 however, that money creation by private banks is not the result of powers conferred upon
7 them by government, but rather the artful use of long held "trade secrets." Thus, unlawful
8 money creation is not being done by banks as corporations, but unlawfully by bankers.
9

10 **Article I, Section 10, para. 1 of the *Constitution of the United States of America***
11 **specifically states that no state shall "... coin money, emit bills of credit, make any**
12 **thing but gold and silver coin a Tender in Payment of Debts, pass any Bill of**
13 **Attainder, ex post facto Law, or Law impairing the Obligations of Contracts . . ."**
14 [Emphasis added]

15 **The states, which grant the Charters of state banks also, prohibit the emitting**
16 **of Bills of credit by not granting such authority in bank charters.** It is obvious that
17 "We the people" never delegated to Congress, state government, or agencies of the state,
18 the power to create and issue money in the form of checks, credit, or other "bills of credit."
19 The Federal Government today does not authorize banks to emit, write, create, issue and
20 pass checks and credit as money. But banks do, and get away with it! Banks call their
21 privately created money nice sounding names, like "credit", "demand deposits", or
22 "checkbook money". However, the true nature of "credit money" and "checks" does not
23 change regardless of the poetic terminology used to describe them. Such money in
24 common use by privately owned banks is illegal under Art. 1, Sec. 10, para. 1 of the
25
26
27
28

1 Constitution of the United States of America, as well as unlawful under the laws of the
2 United States and of this State.

3 VOID "ULTRA VIRES" CONTRACTS

4
5 The courts have long held that when a corporation executes a contract beyond the scope of
6 its charter or granted corporate powers, the contract is void or "ultra vires".

- 7 1. In *Central Transp. Co. v. Pullman*, 139 U.S. 60, 11 S. Ct. 478, 35 L. Ed. 55, the
8 court said: "A contract *ultra vires* being unlawful and void, not because it is in
9 itself immoral, but because the corporation, by the law of its creation, is incapable
10 of making it, the courts, while refusing to maintain any action upon the unlawful
11 contract, have always striven to do justice between the parties, so far as could be
12 done consistently with adherence to law, by permitting property or money, parted
13 with on the faith of the unlawful contract, to be recovered back, or compensation to
14 be made for it. In such case, however, the action is not maintained upon the
15 unlawful contract, nor according to its terms; but on an implied contract of the
16 defendant to return, or, failing to do that, to make compensation for, property or
17 money which it has no right to retain. To maintain such an action is not to affirm,
18 but to disaffirm, the unlawful contract."
- 19 2. "When a contract is once declared ultra vires, the fact that it is executed does not
20 validate it, nor can it be ratified, so as to make it the basis of suitor action, nor does
21 the doctrine of estoppel apply." *F&PR v. Richmond*, 133 SE 898; 151 Va 195.
- 22 3. "A national bank ... cannot lend its credit to another by becoming surety, indorser,
23 or guarantor for him, such an act ; is ultra vires . . ." *Merchants' Bank v. Baird* 160
24 F 642. (Additional cases are cited as footnotes at the end of this Memorandum.)

25 THE QUESTION OF LAWFUL CONSIDERATION

26 The issue of whether the lender who writes and passes a "bad" check or makes a
27 "credit" loan has a claim for relief against the borrower is easy to answer, providing the
28 lender can prove that he gave a lawful consideration, based upon lawful acts. But did the
lender give a lawful consideration? To give a lawful consideration, the lender must
prove that he gave the borrower lawful money such as coins or currency. Failing
that, he can have no claim for relief in a court at law against the borrower as the
lender's actions were ultra vires or void from the beginning of the transaction.

1 It can be argued that "bad" checks or "credit" loans that pass as money are
2 valuable; but so are counterfeit coins and currency that pass as money. It seems
3 unconscionable that a bank would ask homeowners to put up a homestead as collateral for
4 a "credit loan" that the bank created out of thin air. Would this court of law or equity allow
5 a counterfeiter to foreclose against a person's home because the borrower was late in
6 payments on an unlawful loan of counterfeit money? Were the court to do so, it would be
7 contrary to all principles of law.
8

9
10 The question of valuable consideration in the case at bar, does not depend on any
11 value imparted by the lender, but the false confidence instilled in the "bad" check or
12 "credit" loan by the lender. In a court at law or equity, the lender has no claim for relief.
13 The argument that because the borrower received property for the lender's "bad" check or
14 "credit" loan gives the lender a claim for relief is not valid, unless the lender can prove
15 that he gave lawful value. The seller in some cases who may be holding the "bad" check
16 or "Credit" loan has a claim for relief against the lender or the borrower or both, but the
17 lender has no such claim.
18

19 BORROWER RELIEF

20
21 Since we have established that the lender of unlawful or counterfeit money has no
22 claim for relief under a void contract, the last question should be, does the borrower have
23 a claim for relief against the lender? First, if it is established that the borrower has made
24 no payments to the lender, then the borrower has no claim for relief against the lender for
25 money damages. But the borrower has a claim for relief to void the debt he owes the
26
27
28

1 lender for notes or obligations unlawfully created by an ultra vires contract for lending
2 "credit" money.

3 **The borrower, the Courts have long held, has a claim for relief against the**
4 **lender to have the note, security agreement, or mortgage note the borrower signed**
5 **declared null and void.**

6
7 The borrower may also have claims for relief for breach of contract by the lender
8 for not lending "lawful money" and for "usury" for charging an interest rate several times
9 greater than the amount agreed to in the contract for any lawful money actually risked by
10 the lender. For example, if on a \$100,000 loan it can be established that the lender actually
11 risked only \$5,000 (5% Federal Reserve ratio) with a contract interest rate of 10%, the
12 lender has then loaned \$95,000 of "credit" and \$5,000 of "lawful money". However, while
13 charging 10% interest (\$10,000) on the entire \$100,000. The true interest rate on the
14 \$5,000 of "lawful money" actually risked by the lender is 200% which violates Usury
15 laws of this state.

16
17 **If no "lawful money" was loaned, then the interest rate is an infinite**
18 **percentage. Such techniques the bankers say were learned from the trade secrets of**
19 **the Goldsmiths. The Courts have repeatedly ruled that such contracts with**
20 **borrowers are wholly void from the beginning of the transaction, because banks are**
21 **not granted powers to enter into such contracts by either state or national charters.**

22 **ADDITIONAL BORROWER RELIEF**

23
24 In Federal District Court the borrower may have additional claims for relief under
25 "Civil RICO" Federal Racketeering laws (18 U.S.C. §1964). The lender may have
26
27
28

1 established a "pattern of racketeering activity" by using the U.S. Mail more than twice to
2 collect an unlawful debt and the lender may be in violation of 18 U.S.C. §§§§1341, 1343,
3 1961 and 1962.

4
5 The borrower has other claims for relief if he can prove there was or is a conspiracy
6 to deprive him of property without due process of law under. (42 U.S.C. §§§1983
7 (Constitutional Injury), 1985(Conspiracy) and 1986 ("Knowledge" and "Neglect to
8 Prevent" a U.S. Constitutional Wrong), Under 18 U.S.C.A. § 241 (Conspiracy) violators,
9 "shall be fined not more than \$10,000 or imprisoned not more than ten (10) years or both."
10 In a Debtor's RICO action against its creditor, alleging that the creditor had collected an
11 unlawful debt, an interest rate (where all loan charges were added together) that exceeded,
12 in the language of the RICO Statute, "twice the enforceable rate." The Court found no
13 reason to impose a requirement that the Plaintiff show that the Defendant had been
14 convicted of collecting an unlawful debt, running a "loan sharking" operation. The debt
15 included the fact that exaction of a usurious interest rate rendered the debt unlawful and
16 that is all that is necessary to support the Civil RICO action. Durante Bros. & Sons, Inc. v.
17 Flushing Nat 'l Bank, 755 F2d 239, Cert. denied, 473 US 906 (1985).
18
19
20

21 The Supreme Court found that the Plaintiff in a civil RICO action, need establish
22 only a criminal "violation" and not a criminal conviction. Further, the Court held that the
23 Defendant need only have caused harm to the Plaintiff by the commission of a predicate
24 offense in such a way as to constitute a "pattern of Racketeering activity." That is, the
25 Plaintiff need not demonstrate that the Defendant is an organized crime figure, a mobster
26 in the popular sense, or that the Plaintiff has suffered some type of special Racketeering
27
28

1 injury; all that the Plaintiff must show is what the Statute specifically requires. The RICO
2 Statute and the civil remedies for its violation are to be liberally construed to effect the
3 congressional purpose as broadly formulated in the Statute. Sedima, SPRL v. Imrex Co.,
4 473 US 479 (1985).
5

6 Aside from any legal obligation, there exists a societal and moral obligation enure
7 to both the Plaintiff and the Defendant in that if you were to defuse a Bomb, and you
8 completed the task 99% correct, you are still dead. Plaintiff believes that his position on
9 the law is sound, but fears grievous repercussions throughout the financial community if
10 he should prevail. The credit for money scheme is endemic throughout our society and
11 could have devastating effects on the national economy.
12

13 Plaintiff believes that another approach may be explored as follows:
14

15 **PERFECT OBLIGATION AS TO A HUMAN BEING**

16 That which is borrowed is wealth. Labor created that wealth, so it is money
17 notwithstanding its form. Consideration is promised in advance by the Promissor of the
18 Note, in the nature of principal and interest payments for the consideration provided by the
19 lender, which is his personal wealth created by his labor.
20

21 A Mortgage Note or Promissory Note secures the position of the lender and if there
22 is default on the promise to pay then the borrower has agreed to accept the strict
23 foreclosure remedy provided by state statutes.
24

25 Then the borrower obligated themselves to pay back the principal and pay for the
26 use of it, in the form of interest for the years over which the principal is to be paid back.

27 **When payments stop there is a prima facie injury to the lender. When payments stop**
28

1 the lender has strict foreclosure procedure in state court to remedy the pay back of the
2 balance of the principal.

3 Judgment to foreclose on the property is granted upon the mere proof that payments
4 have ceased as promised. The property is sold to cover the unpaid balance; deficiency
5 judgment may be needed. All is right with the world. Here the lender would be prejudiced
6 if complete and swift remedy were not available. Absent such remedy the government
7 would be party to placing the lender into a condition of involuntary servitude to the
8 borrower.
9
10

11 **PERFECT OBLIGATION AS TO A BANK**

12 In years past banks and savings and loans institutions enjoyed the remedy outlined
13 above. The reason was they were lending out money belonging to their depositors and
14 there was prima facie injury to the depositors upon the mere proof that payments had
15 ceased. Thereby the bank as well as the government would be party to creating a condition
16 of involuntary servitude upon the depositors if strict foreclosure remedy were not
17 available. Today depositors are not in jeopardy of being injured when a person borrows
18 money from a bank. The bank does not lead their money, only their credit in the amount of
19 the loan (paper accounting). Hence no prima facie injury exists to either the depositors or
20 the bank upon the mere proof that payments cease. Injury is based upon the payments
21 made as to the credit line.
22
23
24

25 **PERFECT OR IMPERFECT OBLIGATION**

26 A perfect obligation is one recognized and sanctioned by positive law; one of
27 which the fulfillment can be enforced by the aid of the law. But if the duty created by the
28

1 obligation operates only on the moral sense, without being enforced by any positive law, it
2 is called an "imperfect obligation," and creates no right of action, nor has it any legal
3 operation. The duty of exercising gratitude, charity, and the other merely moral duties are
4 examples of this kind of obligation. Edwards v. Keaney, 96 U.S. 595, 600, 24 L.Ed. 793.
5 Government approved the Federal Reserve Bank, Inc., as the Central Banking system for
6 the United States, and it's policy is reviewed by Congress albeit, in a haphazard manner.
7 The Federal Reserve authorizes it's "private money" "Federal Reserve Bank Notes" to be
8 used by lending institutions such as member banks, to operate upon a system of
9 fractionalizing. The nature of which is that they do not lend either their money or the
10 money of the depositors, the money is created out of thin air, by the mere stroke of a pen.
11 When there is no consideration in jeopardy of being returned, then the obligation is to
12 make the bank injury proof, to the extent of the obligation, which would be to make them
13 whole.
14

15
16
17 The only legal obligation is based upon the moral issue, which under the law is an
18 Imperfect Obligation, to return to them their property, which isn't wealth, but credit. A
19 Promissory Note is signed under "economic compulsion" when, the "loan" will not be
20 consummated unless and until the borrower signs it. Thus, performing the act of signing a
21 Promissory Note cannot be considered voluntary.
22

23 The discharging of the credit is based upon social, economic, and moral standards
24 to make the bank whole, if injury is claimed, in any court action where default on the
25 Promissory Note is on record and where the bank fails to verify an injury, the bank cannot
26 enforce a promise to pay consideration where they provided no consideration. For the
27
28

1 bank to be able to force upon the defendant an amount over and above the credit, is to
2 force upon the defendants a debt that goes to the control of their labor against their will.
3 This condition would be Peonage, which has been abolished in this country.
4
5 (42 U.S.C. § 1994, and 18 U.S.C. §1581.)

6 The question then arises as to when is the obligation discharged, to put the bank in
7 a position, where there is no record of injury to it?

8 **BANK CREDIT LOAN EXAMPLE**
9

10 When a person borrows \$100,000.00 at 10 % interest amortized over 30 years at a
11 cost of 4 points, is not the \$4,000.00 for points the profit to the bank? In the paperwork the
12 borrower is charged the \$4,000.00 for points. In essence the bank only provides
13 \$96,000.00 for a \$100,000.00 loan, thereby causing the cost of the loan to be more than
14 \$100,000.00. Example: the borrower's cost of the Note is 10 % of \$100,000.00, or
15 \$10,000.00 for the bank's investment of \$96,000.00. $\$10,000.00 \div \$96,000.00 =$
16 10.42 annual percentage rate (APR). In this process the profit to the bank is received at the
17 closing table. This raises the question at what point in making payments can the
18 holder of the Note no longer sustain injury?
19

20
21 Monthly payments should be \$878.00 for a \$100,000.00 loan at 10 % interest
22 amortized over 30 years [$\$8.78$ per $\$1,000.00 = \$8.78 \times 100 = \$878.00/\text{month}$]. The
23 \$100,000.00 loan divided by \$878.00/monthly payments = 113.4 payments; or after
24 making 114 payments x \$878.00 a total of \$100,092.00 has been paid.
25

26 After 114 payments the credit lined provided by the loan has been discharged. Does
27 injury exist to the bank after the 114th payment? The answer is NO. Where the credit line
28

1 of \$100,000.00 is discharged, where is the injury? There is only injury to the bank where
2 payments have not been made for 9 ½ years (114 payments).

3 If payments stop before the 114th payment then whatever injury exists must be
4 based upon a verified complaint of injury; e.g, that which remains to discharge the credit
5 line after 57 payments is approximately \$50,000.00 [57 x \$878.00 = \$50,046.00].
6

7 **WHAT HAPPENS WHEN PAYMENTS STOP AFTER THE 114TH PAYMENT?**

8 The plan is for the borrower to pay \$878.00 x 360 payments; or \$316,080.00 (over
9 30 years) for a credit line of \$100,000.00.
10

11 The first payment of \$878.00 includes principal of \$55.00 and interests \$833.00.
12 When payments stop prematurely the bank uses the state's strict foreclosure laws color
13 ably as if the bank's wealth or the wealth of the depositors is in jeopardy of being returned.
14 "Colorable transaction, one presenting an appearance which does not correspond with the
15 reality, and, ordinarily, an appearance intended to conceal or to deceive. (Black's Law
16 Dictionary 6th Edition.)
17

18 Is, or is not, a transaction with the bank colorable?
19

20 Plaintiff believes if the borrower stops the payments before the credit line is
21 exhausted then it can be charged that the borrower intended to injure the bank; but that the
22 bank intends to injure the borrower if the borrower has made 114 payments and the bank
23 forecloses intending for the court to rule in their favor. Plaintiff believes that forced
24 collection of anything over the \$100,000.00 is injury to the borrower and is a debt that
25 goes to control their labor against their will. Enforcement of this service is a prohibited
26 condition of peonage.
27
28

1 It is taken that the plaintiff permits the Bank to use the court's process and the
2 state's strict foreclosure procedures as if the bank arranged for consideration to be part of
3 the transaction when the Plaintiff does not refuse to accept the enforcement of this service
4 for the reason that they can only make a defense based upon a verified complaint of injury
5 to the bank since the bank provided no consideration in the transaction. Plaintiff has yet to
6 see a verified complaint of injury filed in these proceedings.
7

8 In the example where 114 payments had been made, and then payments stop, the
9 credit line is discharged. The bank however, based upon the former practice (policy) will
10 claim through a third party, their attorney, using the records color ably in a non verified
11 complaint, that an outstanding balance of approximately \$90,000.00 exists on the 30 year
12 amortized Promissory Note as if the bank provided consideration.
13

14 **Under such circumstances the foreclosure procedure used intends to injure the**
15 **Plaintiffs where there is no verified complaint of injury to defend against.**
16

17 **Due process is violated when the court makes judgment in favor of the bank**
18 **upon the mere proof that the borrower stopped making payments. There is no**
19 **verified complaint of injury to the bank; thereby the strict foreclosure procedure has**
20 **the result of the court, imposing injury to the Plaintiff in an amount certain.**
21

22 Plaintiffs believe the enforcement of this service is peonage. Plaintiffs argue that if
23 the borrower does not refuse to accept for cause, without dishonor, the rebuttable
24 presumptions in the non-verified complaint then they accept being controlled by the
25 court's process and the proceedings is to the non-verified claims. If the Plaintiffs make a
26 proper record (by affidavit) of refusing to accept the non-verified complaint and
27
28

proceedings and their reasons are not controverted with evidence (by affidavit) then a record is made that the claims in the non-verified complaint are irrefutable presumptions. Bailey v. Alabama, 219 U.S. 2193.

Absent a verified complaint of a damaged party, the Plaintiff having repaid the principle of the original loan, can not be held to peonage for the satisfaction of an imperfect obligation.

CONTINUATION OF CASE CITES IN SUPPORT
THE FOLLOWING CASE CITES ALSO SUPPORT THIS MEMORANDUM

1. "A bank may not lend its credit to another even though such a transaction turns out to have been of benefit to the bank, and in support of this a list of cases might be cited, which-would *look like a catalog of ships*." [Emphasis added] Norton Grocery Co. v. Peoples Nat. Bank, 144 SE 505. 151 Va 195.
2. "In the federal courts, it is well established that a national bank has not power to lend its credit to another by becoming surety, indorser, or guarantor for him." Farmers and Miners Bank v. Bluefield Nat'l Bank, 11 F 2d 83, 271 U.S. 669.
3. "A national bank has no power to lend its credit to any person or corporation . . . Bowen v. Needles Nat. Bank, 94 F 925 36 CCA 553, certiorari denied in 20 S.Ct 1024, 176 US 682, 44 LED 637.
4. "The doctrine of ultra vires is a most powerful weapon to keep private corporations within their legitimate spheres and to punish them for violations of their corporate charters, and it probably is not invoked too often . . . Zinc Carbonate Co. v. First National Bank, 103 Wis 125, 79 NW 229. American Express Co. v. Citizens State Bank, 194 NW 430.
5. "It has been settled beyond controversy that a national bank, under federal Law being limited in its powers and capacity, cannot lend its credit by guaranteeing the debts of another. All such contracts entered into by its officers are ultra vires . . ." Howard & Foster Co. v. Citizens Nat'l Bank of Union, 133 SC 202, 130 SE 759(1926).
6. "... checks, drafts, money orders, and bank notes are not lawful money of the United States ..." State v. Neilon, 73 Pac 324, 43 Ore 168.
7. "Neither, as included in its powers not incidental to them, is it a part of a bank's business to lend its credit. If a bank could lend its credit as well as its money, it might, if it received compensation and was careful to put its name only to solid paper, make a great deal more than any lawful interest on its money would amount to. If not careful, the power would be the mother of panics, . . . Indeed, lending credit is the exact opposite of lending money, which is the real business of a bank, for while the latter creates a liability in favor of the bank, the former gives rise to a liability of the bank to another. *I Morse. Banks and Banking* 5th Ed. Sec 65;

- 1 Magee, Banks and Banking, 3rd Ed. Sec 248." American Express Co. v. Citizens
2 State Bank, 194 NW 429.
- 3 8. "It is not within those statutory powers for a national bank, even though solvent, to
4 lend its credit to another in any of the various ways in which that might be done."
5 Federal Intermediate Credit Bank v. L'Harrison, 33 F 2d 841, 842 (1929).
- 6 9. "There is no doubt but what the law is that a national bank cannot lend its credit or
7 become an accommodation endorser." National Bank of Commerce v. Atkinson, 55
8 E 471.
- 9 10. "A bank can lend its money, but not its credit." First Nat'l Bank of Tallapoosa v.
10 Monroe, 135 Ga 614, 69 SE 1124, 32 LRA (NS) 550.
- 11 11. "... the bank is allowed to hold money upon personal security; but it must be
12 money that it loans, not its credit." Seligman v. Charlottesville Nat. Bank, 3 Hughes
13 647, Fed Case No. 12, 642, 1039.
- 14 12. "A loan may be defined as the delivery by one party to, and the receipt by another
15 party of, a sum of money upon an agreement, express or implied, to repay the sum
16 with or without interest." Parsons v. Fox 179 Ga 605, 176 SE 644. Also see
17 Kirkland v. Bailey, 155 SE 2d 701 and United States v. Neifert White Co., 247 Fed
18 Supp 878, 879.
- 19 13. "The word 'money' in its usual and ordinary acceptance means gold, silver, or
20 paper money used as a circulating medium of exchange . . ." Lane v. Railey 280 Ky
21 319, 133 SW 2d 75.
- 22 14. "A promise to pay cannot, by argument, however ingenious, be made the equivalent
23 of actual payment ..." Christensen v. Beebe, 91 P 133, 32 Utah 406.
- 24 15. "A bank is not the holder in due course upon merely crediting the depositors
25 account." Bankers Trust v. Nagler, 229 NYS 2d 142, 143.
- 26 16. "A check is merely an order on a bank to pay money." Young v. Hembree, 73 P2d
27 393.
- 28 17. "Any false representation of material facts made with knowledge of falsity and with
intent that it shall be acted on by another in entering into contract, and which is so
acted upon, constitutes 'fraud,' and entitles party deceived to avoid contract or
recover damages." Barnsdall Refining Corn. v. Birnam Wood Oil Co. 92 F 26 817.
18. "Any conduct capable of being turned into a statement of fact is representation.
There is no distinction between misrepresentations effected by words and
misrepresentations effected by other acts." Leonard v. Springer 197 Ill 532, 64 NE
301.
19. "If any part of the consideration for a promise be illegal, or if there are several
considerations for an unseverable promise one of which is illegal, the promise,
whether written or oral, is wholly void, as it is impossible to say what part or which
one of the considerations induced the promise." Menominee River Co. v. Augustus
Spies L & C Co., 147 Wis 559-572; 132 NW 1122.

20. "The contract is void if it is only in part connected with the illegal transaction and the promise single or entire." Guardian Agency v. Guardian Mut. Savings Bank, 227 Wis 550, 279 NW 83.

21. "It is not necessary for rescission of a contract that the party making the misrepresentation should have known that it was false, but recovery is allowed even though misrepresentation is innocently made, because it would be unjust to allow one who made false representations, even innocently, to retain the fruits of a bargain induced by such representations." Whipp v. Iverson, 43 Wis 2d 166.

22. "Each Federal Reserve bank is a separate corporation owned by commercial banks in its region ..." Lewis v. United States, 680 F 2d 1239 (1982).

LAW OF THE CASE

The law of the case is decreed as follows:

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business....The people of this state do not yield their sovereignty to the agencies which serve them.

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business....The people of this State do not yield their sovereignty to the agencies which serve them.

Laws, whether organic or ordinary, are either written or unwritten.

A written law is that which is promulgated in writing, and of which a record is in existence.

The organic law is the Constitution of Government, and is altogether written. Other written laws are denominated statutes. The written law of this State is therefore contained in its Constitution and statutes, and in the Constitution and statutes of the United States.

Any judicial record may be impeached by evidence of a want of jurisdiction in the Court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.

...at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects...with none to govern but themselves..... [CHISHOLM v. GEORGIA (US) 2 Dall 419, 454, 1 L Ed 440, 455 DALL (1793) pp471-472.]

The very meaning of 'sovereignty' is that the decree of the sovereign makes law. [American Banana Co. v. United Fruit Co., 29 S.Ct. 511, 513, 213 U.S. 347, 53 L.Ed. 826, 19 Ann.Cas. 1047.]

The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative. [Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am.Dec. 89 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 167; 48 C Wharves Sec. 3, 7.]

A consequence of this prerogative is the legal *ubiquity* of the king. His majesty in the eye

1 of the law is always present in all his courts, though he cannot personally distribute
2 justice. (Fortesc.c.8. 2Inst.186) His judges are the mirror by which the king's image is
reflected. 1 Blackstone's Commentaries, 270, Chapter 7, Section 379.

3This declaration of rights may not be construed to impair or deny others retained by the
4 people."

5 The state cannot diminish rights of the people. [Hertado v. California, 100 US 516.]

6 The assertion of federal rights, when plainly and reasonably made, is not to be defeated
under the name of local practice. [Davis v. Wechsler, 263 US 22, 24.]

7 Where rights secured by the Constitution are involved, there can be no rule making or
8 legislation which would abrogate them. [Miranda v. Arizona, 384 US 436, 491.]

9 There can be no sanction or penalty imposed upon one because of this exercise of
constitutional rights. [Sherer v. Cullen, 481 F 946.]

10 Whereas, the people of Arizona have presented a constitution....and which, on due
11 examination, is found to be republican in its form of government....

12 Republican government. One in which the powers of sovereignty are vested in the people
and are exercised by the people, either directly, or through representatives chosen by the
13 people, to whom those powers are specially delegated. [In re Duncan, 139 U.S. 449, 11
S.Ct. 573, 35 L.Ed. 219; Minor v. Happersett, 88 U.S. (21 Wall.) 162, 22 L.Ed. 627."
14 Black's Law Dictionary, Fifth Edition, p. 626.]

15 The State of Arizona is an inseparable part of the United States of America, and the
United States Constitution is the supreme law of the land.

16 This Constitution, and the Laws of the United States which shall be made in Pursuance
thereof; and all Treaties made, or which shall be made, under the Authority of the United
17 States, shall be the supreme Law of the Land; and the Judges in every State shall be bound
thereby; any Thing in the Constitution or Laws of any State to the Contrary
18 notwithstanding. [Constitution for the United States of America, Article VI, Clause 2.]
Conspiracy against rights: If two or more persons conspire to injure, oppress, threaten, or
19 intimidate any person in any State, Territory, Commonwealth, Possession, or District in
the free exercise or enjoyment of any right or privilege secured to him by the Constitution
20 or laws of the United States, or because of his having so exercised the same; or If two or
more persons go in disguise on the highway, or on the premises of another, with intent to
21 prevent or hinder his free exercise or enjoyment of any right or privilege so secured - They
shall be fined under this title or imprisoned not more than ten years, or both; and if death
22 results from the acts committed in violation of this section or if such acts include
kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit
23 aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or
imprisoned for any term of years or for life, or both, or may be sentenced to death. [18,
24 USC 241]

25 Deprivation of rights under color of law: Whoever, under color of any law, statute,
ordinance, regulation, or custom, willfully subjects any person in any State, Territory,
26 Commonwealth, Possession, or District to the deprivation of any rights, privileges, or
immunities secured or protected by the Constitution or laws of the United States, or to
27 different punishments, pains, or penalties, on account of such person being an alien, or by
reason of his color, or race, than are prescribed for the punishment of citizens, shall be
28 fined under this title or imprisoned not more than one year, or both; and if bodily injury

1 results from the acts committed in violation of this section or if such acts include the use,
2 attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined
3 under this title or imprisoned not more than ten years, or both; and if death results from
4 the acts committed in violation of this section or if such acts include kidnapping or an
attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual
abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of
years or for life, or both, or may be sentenced to death. [18, USC 242]

5 Property rights of citizens: All citizens of the United States shall have the same right, in
6 every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase,
lease, sell, hold, and convey real and personal property. [42 USC 1982]

7 Civil action for deprivation of rights: Every person who, under color of any statute,
8 ordinance, regulation, custom, or usage, of any State or Territory or the District of
9 Columbia, subjects, or causes to be subjected, any citizen of the United States or other
10 person within the jurisdiction thereof to the deprivation of any rights, privileges, or
11 immunities secured by the Constitution and laws, shall be liable to the party injured in an
12 action at law, suit in equity, or other proper proceeding for redress, except that in any
action brought against a judicial officer for an act or omission taken in such officer's
judicial capacity, injunctive relief shall not be granted unless a declaratory decree was
violated or declaratory relief was unavailable. For the purposes of this section, any Act of
Congress applicable exclusively to the District of Columbia shall be considered to be a
statute of the District of Columbia. [42 USC 1983]

13 Conspiracy to interfere with civil rights: Depriving persons of rights or privileges: If two
14 or more persons in any State or Territory conspire or go in disguise on the highway or on
15 the premises of another, for the purpose of depriving, either directly or indirectly, any
16 person or class of persons of the equal protection of the laws, or of equal privileges and
17 immunities under the laws; or for the purpose of preventing or hindering the constituted
18 authorities of any State or Territory from giving or securing to all persons within such
19 State or Territory the equal protection of the laws; or if two or more persons conspire to
20 prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from
21 giving his support or advocacy in a legal manner, toward or in favor of the election of any
lawfully qualified person as an elector for President or Vice President, or as a Member of
Congress of the United States; or to injure any citizen in person or property on account of
such support or advocacy; in any case of conspiracy set forth in this section, if one or
more persons engaged therein do, or cause to be done, any act in furtherance of the object
of such conspiracy, whereby another is injured in his person or property, or deprived of
having and exercising any right or privilege of a citizen of the United States, the party so
injured or deprived may have an action for the recovery of damages occasioned by such
injury or deprivation, against any one or more of the conspirators. [42 USC 1985(3)]

22 Action for neglect to prevent: Every person who, having knowledge that any of the
23 wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be
24 committed, and having power to prevent or aid in preventing the commission of the same,
25 neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party
26 injured, or his legal representatives, for all damages caused by such wrongful act, which
27 such person by reasonable diligence could have prevented; and such damages may be
28 recovered in an action on the case; and any number of persons guilty of such wrongful
neglect or refusal may be joined as defendants in the action; and if the death of any party
be caused by any such wrongful act and neglect, the legal representatives of the deceased
shall have such action therefor, and may recover not exceeding \$5,000 damages therein,
for the benefit of the widow of the deceased, if there be one, and if there be no widow,
then for the benefit of the next of kin of the deceased. But no action under the provisions
of this section shall be sustained which is not commenced within one year after the cause
of action has accrued. [42 USC 1986]

1 COURT. The person and suit of the sovereign; the place where the sovereign sojourns
2 with his regal retinue, wherever that may be. [Black's Law Dictionary, 5th Edition, page
3 318.]

4 COURT. An agency of the sovereign created by it directly or indirectly under its
5 authority, consisting of one or more officers, established and maintained for the purpose of
6 hearing and determining issues of law and fact regarding legal rights and alleged
7 violations thereof, and of applying the sanctions of the law, authorized to exercise its
8 powers in the course of law at times and places previously determined by lawful authority.
9 [Isbill v. Stovall, Tex.Civ.App., 92 S.W.2d 1067, 1070; Black's Law Dictionary, 4th
10 Edition, page 425]

11 COURT OF RECORD. To be a court of record a court must have four characteristics, and
12 may have a fifth. They are:

13 A. A judicial tribunal having attributes and exercising functions independently of the
14 person of the magistrate designated generally to hold it [Jones v. Jones, 188 Mo.App. 220,
15 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also,
16 Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689][Black's Law Dictionary, 4th Ed.,
17 425, 426]

18 B. Proceeding according to the course of common law [Jones v. Jones, 188 Mo.App. 220,
19 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also,
20 Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689][Black's Law Dictionary, 4th Ed.,
21 425, 426]

22 C. Its acts and judicial proceedings are enrolled, or recorded, for a perpetual memory and
23 testimony. [3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F.
24 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229;
25 Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231]

26 D. Has power to fine or imprison for contempt. [3 Bl. Comm. 24; 3 Steph. Comm. 383;
27 The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S.,
28 D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229,
231.][Black's Law Dictionary, 4th Ed., 425, 426]

29 E. Generally possesses a seal. [3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas
30 Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37
31 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231.][Black's
32 Law Dictionary, 4th Ed., 425, 426]

33 The following persons are magistrates: ...The judges of the superior courts.... [California
34 Penal Code, Sec. 808.]

35 ...our justices, sheriffs, mayors, and other ministers, which under us have the laws of our
36 land to guide, shall allow the said charters pleaded before them in judgement in all their
37 points, that is to wit, the Great Charter as the common law.... [Confirmatio Cartarum,
38 November 5, 1297, *Sources of Our Liberties* Edited by Richard L. Perry, American Bar
Foundation]

39 Henceforth the writ which is called Praecipe shall not be served on any one for any
40 holding so as to cause a free man to lose his court. [Magna Carta, Article 34].

41 If any claim, statement, fact, or portion in this action is held inapplicable or not valid, such
42 decision does not affect the validity of any other portion of this action.

43 The singular includes the plural and the plural the singular.

The present tense includes the past and future tenses; and the future, the present.
The masculine gender includes the feminine and neuter.

NATIONAL CURRENCY ACT

(later called "NATIONAL BANK ACT")

June 3, 1864

1865, ch. 78, §§ 6, 7.
Post, p. 484.

Currency bureau
established.

Comptroller of the
currency.

Appointment.

Term of office.

Salary.

Deputy comptroller.

Clerks.

Comptroller to take
oath within what time.

Bond.

Oath and bond of
deputy comptroller.

Not to be interested in
any banking
association.

Seal of currency
bureau,

and where to be kept.

Certain papers under
such seal to be
evidence.

Impression may be
upon paper.

CHAP. CVI. — *An Act to provide a National Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be established in the treasury department a separate bureau, which shall be charged with the execution of this and all other laws that may be passed by congress respecting the issue and regulation of a national currency secured by United States bonds. The chief officer of the said bureau shall be denominated the comptroller of the currency, and shall be under the general direction of the Secretary of the Treasury. He shall be appointed by the President, on the recommendation of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate; he shall receive an annual salary of five thousand dollars; he shall have a competent deputy, appointed by the secretary, whose salary shall be two thousand five hundred dollars, and who shall possess the power and perform the duties attached by law to the office of comptroller during a vacancy in such office and during his absence or inability; he shall employ, from time to time, the necessary clerks to discharge such duties as he shall direct, which clerks shall be appointed and classified by the Secretary of the Treasury in the manner now provided by law. Within fifteen days from the time of notice of his appointment the comptroller shall take and subscribe the oath of office prescribed by the constitution and laws of the United States; and he shall give to the United States a bond in the penalty of one hundred thousand dollars, with not less than two responsible sureties, to be approved by the Secretary of the Treasury, conditioned for the faithful discharge of the duties of his office. The deputy-comptroller so appointed shall also take the oath of office prescribed by the constitution and laws of the United States, and shall give a like bond in the penalty of fifty thousand dollars. The comptroller and deputy-comptroller shall not, either directly or indirectly, be interested in any association issuing national currency under the provisions of this act.

SEC. 2. And be it further enacted, That the comptroller of the currency, with the approval of the Secretary of the Treasury, shall devise a seal, with suitable inscriptions, for his office, a description of which, with a certificate of approval by the Secretary of the Treasury, shall be filed in the office of the Secretary of State with an impression thereof, which shall thereupon become the seal of office of the comptroller of the currency, and the same may be renewed when necessary. Every certificate, assignment, and conveyance executed by the comptroller, in pursuance of any authority conferred on him by law, and sealed with his seal of office, shall be received in evidence in all places and courts whatsoever; and all copies of papers in

1 the office of the comptroller, certified by him and authenticated by the said
2 seal, shall in all cases be evidence equally and in like manner as the original.
3 An impression of such seal directly on the paper shall be as valid as if made
4 on wax or wafer.

5 SEC. 3. *And be it further enacted*, That there shall be assigned to the
6 comptroller of the currency by the Secretary of the Treasury suitable rooms
7 in the treasury building for conducting the business of the currency bureau,
8 in which shall be safe and secure fire-proof vaults, in which it shall be the
9 duty of the comptroller to deposit and safely keep all the plates not
10 necessarily in the possession of engravers or printers, and other valuable
11 things belonging to his department; and the comptroller shall from time to
12 time furnish necessary furniture, stationery, fuel, lights, and other proper
13 conveniences for the transaction of the said business.

14 SEC. 4. *And be it further enacted*, That the term "United States Bonds," as
15 used in this act, shall be construed to mean all registered bonds now issued,
16 or that may hereafter be issued, on the faith of the United States by the
17 Secretary of the Treasury in pursuance of law.

18 SEC. 5. *And be it further enacted*, That associations for carrying on the
19 business of banking may be formed by any number of persons, not less in
20 any case than five, who shall enter into articles of association, which shall
21 specify in general terms the object for which the association is formed, and
22 may contain any other provisions, not inconsistent with provisions of this
23 act, which the association may see fit to adopt for the regulation of the
24 business of the association and the conduct of its affairs, which said articles
25 shall be signed by the persons uniting to form the association, and a copy of
26 them forwarded to the comptroller of the currency, to be filed and preserved
27 in his office.

28 SEC. 6. *And be it further enacted*, That the persons uniting to form such an
association shall, under their hands, make an organization certificate, which
shall specify—

First. The name assumed by such association, which name shall be subject
to the approval of the comptroller.

Second. The place where its operations of discount and deposit are to be
carried on, designating the state, territory, or district, and also the particular
county and city, town, or village.

Third. The amount of its capital stock, and the number of shares into which
the same shall be divided.

Fourth. The names and places of residence of the shareholders, and the
number of shares held by each of them.

Fifth. A declaration that said certificate is made to enable such persons to
avail themselves of the advantages of this act.

The said certificate shall be acknowledged before a judge of some court
of record or a notary public, and such certificate, with the acknowledgement
thereof authenticated by the seal of such court or notary, shall be transmitted
to the comptroller of the currency, who shall record and carefully preserve
the same in his office. Copies of such certificate, duly certified by the
comptroller, and authenticated by his seal of office, shall be legal and
sufficient evidence in all courts and places within the United States, or the
jurisdiction of the government thereof, of the existence of such association,
and of every other matter or thing which could be proved by the production
of the original certificate.

SEC. 7. *And be it further enacted*, That no association shall be organized

1 be not less than, &c.

2 Proviso.

4 Associations when to
be corporations and
5 when to commence
6 business.

7 Seal.

8 May continue twenty
9 years, unless, &c.

10 General powers.

11 Directors and officers.

12 By-laws.

19 Directors;

20 qualifications;

21 one to be president.

22 Oath.

under this act, with a less capital than one hundred thousand dollars, nor in a city whose population exceeds fifty thousand persons, with a less capital than two hundred thousand dollars: *Provided*, That banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants.

SEC. 8. *And be it further enacted*, That every association formed pursuant to the provisions of this act shall, from the date of the execution of its organization certificate, be a body corporate, but shall transact no business except such as may be incidental to its organization and necessarily preliminary, until authorized by the comptroller of the currency to commence the business of banking. Such association shall have power to adopt a corporate seal, and shall have succession by the name designated in its organization certificate, for the period of twenty years from its organization, unless sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two thirds of its stock, or unless the franchise shall be forfeited by a violation of this act; by such name it may make contracts, sue and be sued, complain and defend, in any court of law and equity as fully as natural persons; it may elect or appoint directors, and by its board of directors appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss said officers or any of them at pleasure, and appoint others to fill their places, and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act; and its board of directors shall also have power to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and all the privileges granted by this act to associations organized under it shall be exercised and enjoyed; and its usual business shall be transacted at an office or banking house located in the place specified in its organization certificate.

SEC. 9. *And be it further enacted*, That the affairs of every association shall be managed by not less than five directors, one of whom shall be the president. Every director shall, during his whole term of service, be a citizen of the United States; and at least three fourths of the directors shall have resided in the state, territory, or district in which such association is located one year next preceding their election as directors, and be residents of the same during their continuance in office. Each director shall own, in his own right, at least ten shares of the capital stock of the association of which he is a director. Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this act, and that he is the bona fide owner, in his own right, of the number of shares of stock required by this act, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt; which oath, subscribed by himself, and certified by the officer before whom it is taken, shall be immediately transmitted to the comptroller of the currency, and by him filed and

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preserved in his office.

Term of office of
directors.

Elections.

Vacancies, how filled.

SEC. 10. *And be it further enacted*, That the directors of any association first elected or appointed shall hold their places until their successors shall be elected and qualified. All subsequent elections shall be held annually on such day in the month of January as may be specified in the articles of association; and the directors so elected shall hold their places for one year, and until their successors are elected and qualified. But any director ceasing to be the owner of the requisite amount of stock, or having in any other manner become disqualified, shall thereby vacate his place. Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election. If from any cause an election of directors shall not be made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county, such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if the election should not be held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise: *Provided*, That if the directors fail to fix the day, as aforesaid, shareholders representing two thirds of the shares may.

Voting and proxies.

SEC. 11. *And be it further enacted*, That in all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or book-keeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote.

Capital stock to be
divided into shares.

Transfer.

Rights of existing
creditors not to be
impaired.

Individual liability.

SEC. 12. *And be it further enacted*, That the capital stock of any association formed under this act shall be divided into shares of one hundred dollars each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired. The shareholders of each association formed under the provisions of this act, and of each existing bank or banking association that may accept the provisions of this act, shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under state laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the comptroller of the currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this act; and if at any time there shall be a deficiency in said surplus of twenty per centum, the said banking association shall not pay any dividends to its shareholders until such deficiency shall be made good; and in case of such deficiency, the comptroller of the currency may compel said banking association to close its business and wind up its affairs under the provisions of this act. And the

When comptroller
may withhold
certificate.

1 comptroller shall have authority to withhold from an association his
2 certificate authorizing the commencement of business, whenever he shall
3 have reason to suppose that the shareholders thereof have formed the same
4 for any other than the legitimate objects contemplated by this act.

5 SEC. 13. *And be it further enacted*, That it shall be lawful for any
6 association formed under this act, by its articles of association, to provide
7 for an increase of its capital from time to time, as may be deemed expedient,
8 subject to the limitations of this act: *Provided*, That the maximum of such
9 increase in the articles of association shall be determined by the comptroller
10 of the currency; and no increase of capital shall be valid until the whole
11 amount of such increase shall be paid in, and notice thereof shall have been
12 transmitted to the comptroller of the currency, and his certificate obtained
13 specifying the amount of such increase of capital stock, with his approval
14 thereof, and that it has been duly paid in as part of the capital of such
15 association. And every association shall have power, by the vote of
16 shareholders owning two thirds of its capital stock, to reduce the capital of
17 such association to any sum not below the amount required by this act, in
18 the formation of associations: *Provided*, That by no such reduction shall its
19 capital be brought below the amount required by this act for its outstanding
20 circulation, nor shall any such reduction be made until the amount of the
21 proposed reduction has been reported to the comptroller of the currency and
22 his approval thereof obtained.

23 SEC. 14. *And be it further enacted*, That at least fifty per centum of the
24 capital stock of every association shall be paid in before it shall be
25 authorized to commence business; and the remainder of the capital stock of
26 such association shall be paid in instalments of at least ten per centum each
27 on the whole amount of the capital as frequently as one instalment at the end
28 of each succeeding month from the time it shall be authorized by the
comptroller to commence business; and the payment of each instalment shall
be certified to the comptroller, under oath, by the president or cashier of the
association.

SEC. 15. *And be it further enacted*, That if any shareholder, or his assignee,
shall fail to pay any instalment on the stock when the same is required by
the foregoing section to be paid, the directors of such association may sell
the stock of such delinquent shareholder at public auction, having given
three weeks' previous notice thereof in a newspaper published and of general
circulation in the city or county where the association is located, and if no
newspaper is published in said city or county, then in a newspaper published
nearest thereto, to any person who will pay the highest price therefor, and
not less than the amount due thereon, with the expenses of advertisement
and sale; and the excess, if any, shall be paid to the delinquent shareholder.
If no bidder can be found who will pay for such stock the amount due
thereon to the association, and the cost of advertisement and sale, the
amount previously paid shall be forfeited to the association, and such stock
shall be sold as the directors may order, within six months from the time of
such forfeiture, and if not sold it shall be cancelled and deducted from the
capital stock of the association; and if such cancellation and reduction shall
reduce the capital of the association below the minimum of capital required
by this act, the capital stock shall, within thirty days from the date of such
cancellation, be increased to the requirements of the act, in default of which
a receiver may be appointed to close up the business of the association
according to the provisions of the fiftieth section of this act.

SEC. 16. *And be it further enacted*, That every association, after having
complied with the provisions of this act, preliminary to the commencement

1 Increase of capital
2 stock.
3 Maximum.
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8 Minimum.
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13 Amount to be paid in
14 before commencing
15 business.
16 Remainder, when to
17 be paid.
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19 Proceedings, if
20 shareholder fails to
21 pay instalments.
22 Stock of delinquent
23 shareholders to be
24 sold.
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26
27
28 United States
registered bonds to be

1 comptroller shall have authority to withhold from an association his
2 certificate authorizing the commencement of business, whenever he shall
3 have reason to suppose that the shareholders thereof have formed the same
4 for any other than the legitimate objects contemplated by this act.

5 *SEC. 13. And be it further enacted,* That it shall be lawful for any
6 association formed under this act, by its articles of association, to provide
7 for an increase of its capital from time to time, as may be deemed expedient,
8 subject to the limitations of this act: *Provided,* That the maximum of such
9 increase in the articles of association shall be determined by the comptroller
10 of the currency; and no increase of capital shall be valid until the whole
11 amount of such increase shall be paid in, and notice thereof shall have been
12 transmitted to the comptroller of the currency, and his certificate obtained
13 specifying the amount of such increase of capital stock, with his approval
14 thereof, and that it has been duly paid in as part of the capital of such
15 association. And every association shall have power, by the vote of
16 shareholders owning two thirds of its capital stock, to reduce the capital of
17 such association to any sum not below the amount required by this act, in
18 the formation of associations: *Provided,* That by no such reduction shall its
19 capital be brought below the amount required by this act for its outstanding
20 circulation, nor shall any such reduction be made until the amount of the
21 proposed reduction has been reported to the comptroller of the currency and
22 his approval thereof obtained.

23 *SEC. 14. And be it further enacted,* That at least fifty per centum of the
24 capital stock of every association shall be paid in before it shall be
25 authorized to commence business; and the remainder of the capital stock of
26 such association shall be paid in instalments of at least ten per centum each
27 on the whole amount of the capital as frequently as one instalment at the end
28 of each succeeding month from the time it shall be authorized by the
comptroller to commence business; and the payment of each instalment shall
be certified to the comptroller, under oath, by the president or cashier of the
association.

SEC. 15. And be it further enacted, That if any shareholder, or his assignee,
shall fail to pay any instalment on the stock when the same is required by
the foregoing section to be paid, the directors of such association may sell
the stock of such delinquent shareholder at public auction, having given
three weeks' previous notice thereof in a newspaper published and of general
circulation in the city or county where the association is located, and if no
newspaper is published in said city or county, then in a newspaper published
nearest thereto, to any person who will pay the highest price therefor, and
not less than the amount due thereon, with the expenses of advertisement
and sale; and the excess, if any, shall be paid to the delinquent shareholder.
If no bidder can be found who will pay for such stock the amount due
thereon to the association, and the cost of advertisement and sale, the
amount previously paid shall be forfeited to the association, and such stock
shall be sold as the directors may order, within six months from the time of
such forfeiture, and if not sold it shall be cancelled and deducted from the
capital stock of the association; and if such cancellation and reduction shall
reduce the capital of the association below the minimum of capital required
by this act, the capital stock shall, within thirty days from the date of such
cancellation, be increased to the requirements of the act, in default of which
a receiver may be appointed to close up the business of the association
according to the provisions of the fiftieth section of this act.

SEC. 16. And be it further enacted, That every association, after having
complied with the provisions of this act, preliminary to the commencement

1 deposited with
2 treasurer to an amount
3 equal to one third of
4 the capital stock.
5 Deposit to be
6 increased;
7 may be diminished.

of banking business under its provisions, and before it shall be authorized to commence business, shall transfer and deliver to the treasurer of the United States any United States registered bonds bearing interest to an amount not less than thirty thousand dollars nor less than one third of the capital stock paid in, which bonds shall be deposited with the treasurer of the United States and by him safely kept in his office until the same shall be otherwise disposed of, in pursuance of the provisions of this act; and the Secretary of the Treasury is hereby authorized to receive and cancel any United States coupon bonds, and to issue in lieu thereof registered bonds of like amount, bearing a like rate of interest, and having the same time to run; and the deposit of bonds shall be, by every association, increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the treasurer registered United States bonds to the amount of at least one third of its capital stock actually paid in: *Provided*, That nothing in this section shall prevent an association that may desire to reduce its capital or to close up its business and dissolve its organization from taking up its bonds upon returning to the comptroller its circulation notes in the proportion hereinafter named in this act, nor from taking up any excess of bonds beyond one third of its capital stock and upon which no circulating notes have been delivered.

11
12
13
14 Comptroller to
15 examine and
16 determine if
17 association can
18 commence business.

SEC. 17. *And be it further enacted*, That whenever a certificate shall have been transmitted to the comptroller of the currency, as provided in this act, and the association transmitting the same shall notify the comptroller that at least fifty per centum of its capital stock has been paid in as aforesaid, and that such association has complied with all the provisions of this act as required to be complied with before such association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of the directors of such association, and the amount of the capital stock of which each is the bona fide owner, and generally whether such association has complied with all the requirements of this act to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors and by the president or cashier of such association, a statement of all the facts necessary to enable the comptroller to determine whether such association is lawfully entitled to commence the business of banking under this act.

20 When association is
21 found entitled to
22 commence business,
23 comptroller to give
24 certificate.

25 Certificate to be
26 published.

SEC. 18. *And be it further enacted*, That if, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it shall appear that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions of this act required to be complied with before being entitled to commence the business of banking under it, and that such association is authorized to commence said business accordingly; and it shall be the duty of the association to cause said certificate to be published in some newspaper published in the city or county where the association is located for at least sixty days next after the issuing thereof: *Provided*, That if no newspaper is published in such city or county the certificate shall be published in a newspaper published nearest thereto.

27 Transfers of bonds by
28 association, to be

SEC. 19. *And be it further enacted*, That all transfers of United States bonds which shall be made by any association under the provisions of this act shall

1 made to the treasurer be made to the treasurer of the United States in trust for the association, with
in trust. a memorandum written or printed on each bond, and signed by the cashier or
2 How executed. some other officer of the association making the deposit, a receipt therefor to
3 Comptroller to keep be given to said association, or by the comptroller of the currency, or by a
transfer book, &c. clerk appointed by him for that purpose, stating that it is held in trust for the
4 association on whose behalf such transfer is made, and as security for the
5 redemption and payment of any circulating notes that have been or may be
6 delivered to such association. No assignment or transfer of any such bonds
7 by the treasurer shall be deemed valid or of binding force and effect unless
8 countersigned by the comptroller or the currency. It shall be the duty of the
9 comptroller of the currency to keep in his office a book in which shall be
10 entered the name of every association from whose accounts such transfer of
Transfers to be SEC. 20. *And be it further enacted*, That it shall be the duty of the
11 countersigned and comptroller of the currency to countersign and enter in the book, in the
entered. manner aforesaid, every transfer or assignment of any bonds held by the
12 treasurer presented for his signature; and the comptroller shall have at all
13 Books to be times during office hours access to the books of the treasurer, for the
accessible. purpose of ascertaining the correctness of the transfer or assignment
14 presented to him to countersign; and the treasurer shall have the like access
15 to the book above mentioned, kept by the comptroller, during office hours,
16 to ascertain the correctness of the entries in the same; and the comptroller
Associations, after SEC. 21. *And be it further enacted*, That upon the transfer and delivery of
17 transfer, may receive bonds to the treasurer, as provided in the foregoing section, the association
circulating notes. making the same shall be entitled to receive from the comptroller of the
18 1865, ch. 82. currency circulating notes of different denominations, in blank, registered
Post, p. 498. and countersigned as hereinafter provided, equal in amount to ninety per
19 centum of the current market value of the United States bonds so transferred
20 Limit of amount. and delivered, but not exceeding ninety per centum of the amount of said
21 bonds at the par value thereof, if bearing interest at a rate not less than five
22 per centum per annum; and at no time shall the total amount of such notes,
Entire circulation not SEC. 22. *And be it further enacted*, That the entire amount of notes for
23 to exceed circulation to be issued under this act shall not exceed three hundred
\$300,000,000. millions of dollars. In order to furnish suitable notes for circulation, the
24 Comptroller to prepare comptroller of the currency is hereby authorized and required, under the
the notes. direction of the Secretary of the Treasury, to cause plates and dies to be
25 Denominations. engraved, in the best manner to guard against counterfeiting and fraudulent
26 alterations, and to have printed therefrom, and numbered, such quantity of
Notes to express what. circulating notes, in blank, of the denominations of one dollar, two dollars,
27 Devices. three dollars, five dollars, ten dollars, twenty dollars, fifty dollars, one
28 hundred dollars, five hundred dollars, and one thousand dollars, as may be
Notes under \$5. required to supply, under this act, the associations entitled to receive the
same; which notes shall express upon their face that they are secured by
United States bonds, deposited with the treasurer of the United States by the
written or engraved signatures of the treasurer and register, and by the

imprint of the seal of the treasury; and shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signatures of the president or vice-president and cashier. And the said notes shall bear such devices and such other statements, and shall be in such form, as the Secretary of the Treasury shall, by regulation, direct: *Provided*, That not more than one sixth part of the notes furnished to an association shall be of a less denomination than five dollars, and that after specie payments shall be resumed no association shall be furnished with notes of less denomination than five dollars.

When notes may be circulated as money, to be received for all dues, except, &c.

SEC. 23. *And be it further enacted*, That after any such association shall have caused its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its place of business, such association is hereby authorized to issue and circulate the same as money; and the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except for duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency. And no such association shall issue post notes or any other notes to circulate as money than such as are authorized by the foregoing provisions of this act.

Post notes, &c., not to be issued.

Worn-out and mutilated notes.

SEC. 24. *And be it further enacted*, That it shall be the duty of the comptroller of the currency to receive worn-out or mutilated circulating notes issued by any such banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to such association other blank circulating notes to an equal amount. And such worn-out or mutilated notes, after a memorandum shall have been entered in the proper books, in accordance with such regulations as may be established by the comptroller, as well as all circulating notes which shall have been paid or surrendered to be cancelled, shall be burned to ashes in presence of four persons, one to be appointed by the Secretary of the Treasury, one by the comptroller of the currency, one by the treasurer of the United States, and one by the association, under such regulations as the Secretary of the Treasury may prescribe. And a certificate of such burning, signed by the parties so appointed, shall be made in the books of the comptroller, and a duplicate thereof forwarded to the association whose notes are thus cancelled.

Associations to examine annually its bonds deposited, and make certificate.

SEC. 25. *And be it further enacted*, That it shall be the duty of every banking association having bonds deposited in the office of the treasurer of the United States, once or oftener in each fiscal year, and at such time or times during the ordinary business hours as said officer or officers may select, to examine and compare the bonds so pledged with the books of the comptroller and the accounts of the association, and, if found correct, to execute to the said treasurer a certificate setting forth the different kinds and the amounts thereof, and that the same are in the possession and custody of the treasurer at the date of such certificate. Such examination may be made by an officer or agent of such association, duly appointed in writing for that purpose, whose certificate before mentioned shall be of like force and validity as if executed by such president or cashier; and a duplicate signed by the treasurer shall be retained by the association.

Examination of associations.

Deposited bonds to be held exclusively to secure circulation.

SEC. 26. *And be it further enacted*, That the bonds transferred to and deposited with the treasurer of the United States, as hereinbefore provided, by any banking association for the security of its circulating notes, shall be

1 Provision as to
interest.

2 If bonds depreciate,
security to be made
3 good.

4 Bonds may be
exchanged, if, &c.;

5
6
7
8
9
10 may be returned upon
cancellation of
circulating notes.
11 Proviso.

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13
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15
16
17 The countersigning
and delivery of
18 circulating notes,
except as permitted by
19 this act, made
20 unlawful.
21 Penalty.

22 Associations may
hold, &c., certain real
23 estate.

24
25 Real estate.

held exclusively for that purpose, until such notes shall be redeemed, except as provided in this act; but the comptroller of the currency shall give to any such banking association powers of attorney to receive and appropriate to its own use the interest on the bonds which it shall have transferred to the treasurer; but such powers shall become inoperative whenever such banking association shall fail to redeem its circulating notes as aforesaid. Whenever the market or cash value of any bonds deposited with the treasurer of the United States, as aforesaid, shall be reduced below the amount of the circulation issued for the same, the comptroller of the currency is hereby authorized to demand and receive the amount of such depreciation in other United States bonds at cash value, or in money, from the association receiving said bills, to be deposited with the treasurer of the United States as long as such depreciation continues. And said comptroller, upon the terms prescribed by the Secretary of the Treasury, may permit an exchange to be made of any of the bonds deposited with the treasurer by an association for other bonds of the United States authorized by this act to be received as security for circulating notes, if he shall be of opinion that such an exchange can be made without prejudice to the United States, and he may direct the return of any of said bonds to the banking association which transferred the same, in sums of not less than one thousand dollars, upon the surrender to him and the cancellation of a proportionate amount of such circulating notes: *Provided*, That the remaining bonds which shall have been transferred by the banking association offering to surrender circulating notes shall be equal to the amount required for the circulating notes not surrendered by such banking association, and that the amount of bonds in the hands of the treasurer shall not be diminished below the amount required to be kept on deposit with him by this act: *And provided*, That there shall have been no failure by such association to redeem its circulating notes, and no other violations by such association of the provisions of this act, and that the market or cash value of the remaining bonds shall not be below the amount required for the circulation issued for the same.

SEC. 27. *And be it further enacted*, That it shall be unlawful for any officer acting under the provisions of this act to countersign or deliver to any association, or to any other company or person, any circulating notes contemplated by this act, except as hereinbefore provided, and in accordance with the true intent and meaning of this act. And any officer who shall violate the provisions of this section shall be deemed guilty of a high misdemeanor, and on conviction thereof shall be punished by fine not exceeding double the amount so countersigned and delivered, and imprisonment not less than one year and not exceeding fifteen years, at the discretion of the court in which he shall be tried.

SEC. 28. *And be it further enacted*, That it shall be lawful for any such association to purchase, hold, and convey real estate as follows: —

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by such association, or shall purchase to secure debts due to said association.

Such associations shall not purchase or hold real estate in any other case or for any other purpose than as specified in this section. Nor shall it hold possession of any real estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years.

No person, &c., to be liable to association for more than, &c.

SEC. 29. *And be it further enacted*, That the total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one tenth part of the amount of the capital stock of such association actually paid in: *Provided*, That the discount of bona fide bills of exchange drawn against actually existing values, and the discount of commercial or business paper actually owned by the person or persons, corporation, or firm negotiating the same shall not be considered as money borrowed.

Certain discounts not to be included.

Rate of interest.

Penalty for taking greater interest.

SEC. 30. *And be it further enacted*, That every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of bona fide bill of exchange, payable at another place than the place of purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Action to be commenced in two years.

Amount of money to be kept on hand.

Liabilities not to be increased until reserve is made good.

Money deposited for redemption of circulation in certain cities to be included.

Clearing-house certificates to be deemed lawful money for this purpose.

Charleston and Richmond.

If association fails,

SEC. 31. *And be it further enacted*, That every association in the cities hereinafter named shall, at all times, have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its notes in circulation and its deposits; and every other association shall, at all times, have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation, and of its deposits. And whenever the lawful money of any association in any of the cities hereinafter named shall be below the amount of twenty-five per centum of its circulation and deposits, and whenever the lawful money of any other association shall be below fifteen per centum of its circulation and deposits, such associations shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend of its profits until the required proportion between the aggregate amount of its outstanding notes of circulation and deposits and its lawful money of the United States shall be restored: *Provided*, That three fifths of said fifteen per centum may consist of

1 after notice, to make
2 good its reserve.

balances due to an association available for the redemption of its circulating notes from associations approved by the comptroller of the currency, organized under this act, in the cities of Saint Louis, Louisville, Chicago, Detroit, Milwaukee, New Orleans, Cincinnati, Cleveland, Pittsburgh, Baltimore, Philadelphia, Boston, New York, Albany, Leavenworth, San Francisco, and Washington City: *Provided, also*, That clearing-house certificates, representing specie or lawful money specially deposited for the purpose of any clearing-house association, shall be deemed to be lawful money in the possession of any association belonging to such clearing-house holding and owning such certificate, and shall be considered to be a part of the lawful money which such association is required to have under the foregoing provisions of this section: *Provided*, That the cities of Charleston and Richmond may be added to the list of cities in the national associations of which other associations may keep three fifths of their lawful money, whenever, in the opinion of the comptroller of the currency, the condition of the southern states will warrant it. And it shall be competent for the comptroller of the currency to notify any association, whose lawful money reserve as aforesaid shall be below the amount to be kept on hand as aforesaid, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money of the United States, the comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of such association, as provided in this act.

13 Circulation to be
redeemed in New
York at par.

14 Certain associations to
select place for
redemption of
circulation.

16 Proceedings in case of
failure.

20 Each association to
take notes of other
associations.

24 Dividends.

26 Surplus funds.

28 Associations to report
to comptroller

SEC. 32. *And be it further enacted*, That each association organized in any of the cities named in the foregoing section shall select, subject to the approval of the comptroller of the currency, an association in the city of New York, at which it will redeem its circulating notes at par. And each of such associations may keep one half of its lawful money reserve in cash deposits in the city of New York. And each association not organized within the cities named in the preceding section shall select, subject to the approval of the comptroller of the currency, an association in either of the cities named in the preceding section at which it will redeem its circulating notes at par, and the comptroller shall give public notice of the names of the associations so selected at which redemptions are to be made by the respective associations, and of any change that may be made of the association at which the notes of any association are redeemed. If any association shall fail either to make the selection or to redeem its notes as aforesaid, the comptroller of the currency may, upon receiving satisfactory evidence thereof, appoint a receiver, in the manner provided for in this act, to wind up its affairs: *Provided*, That nothing in this section shall relieve any association from its liability to redeem its circulating notes at its own counter, at par, in lawful money, on demand: *And provided, further*, That every association formed or existing under the provisions of this act shall take and receive at par, for any debt or liability to said association, any and all notes or bills issued by any association existing under and by virtue of this act.

SEC. 33. *And be it further enacted*, That the directors of any association may, semi-annually, each year, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to twenty per centum of its capital stock.

SEC. 34. *And be it further enacted*, That every association shall make to the comptroller of the currency a report, according to the form which may be

1 quarterly. prescribed by him, verified by the oath or affirmation of the president or
 2 Contents of report. cashier of such association; which report shall exhibit in detail, and under
 3 Penalty for failing to appropriate heads, the resources and liabilities of the association before the
 4 report. commencement of business on the morning of the first Monday of the month
 5 Comptroller to publish of January, April, July, and October of each year, and shall transmit the
 6 abstracts. same to the comptroller within five days thereafter. And any bank failing to
 7 Monthly statements. make and transmit such report shall be subject to a penalty of one hundred
 8 dollars for each day after five days that such report is delayed beyond that
 9 time. And the comptroller shall publish abstracts of said reports in a
 10 newspaper to be designated by him for that purpose in the city of
 11 Washington, and the separate report of each association shall be published in
 12 a newspaper in the place where such association is established, or if there be
 13 no newspaper at such place, then in a newspaper published at the nearest
 14 place thereto, at the expense of the association making such report. In
 15 addition to the quarterly reports required by this section, every association
 16 shall, on the first Tuesday of each month, make to the comptroller of the
 17 currency a statement, under the oath of the president or cashier, showing the
 18 condition of the association making such statement, on the morning of the
 19 day next preceding the date of such statement, in respect to the following
 20 items and particulars, to wit: average amount of loans and discounts, specie,
 21 and other lawful money belonging to the association, deposits, and
 22 circulation. And associations in other places than those cities named in the
 23 thirty-first section of this act shall also return the amount due them available
 24 for the redemption of their circulation.

25 SEC. 35. *And be it further enacted*, That no association shall make any loan
 26 or discount on the security of the shares of its own capital stock, nor be the
 27 purchaser or holder of any such shares, unless such security or purchases
 28 shall be necessary to prevent loss upon a debt previously contracted in good
 29 faith; and stock so purchased or acquired shall, within six months from the
 30 time of its purchase, be sold or disposed of at public or private sale, in
 31 default of which a receiver may be appointed to close up the business of the
 32 association, according to the provisions of this act.

33 SEC. 36. *And be it further enacted*, That no association shall at any time be
 34 indebted, or in any way liable, to an amount exceeding the amount of its
 35 capital stock at such times actually paid in and remaining undiminished by
 36 losses or otherwise, except on the following accounts, that is to say: —

37 First. On account of its notes in circulation.

38 Second. On account of moneys deposited with, or collected by, such
 39 association.

40 Third. On account of bills of exchange or drafts drawn against money
 41 actually on deposit to the credit of such association, or due thereto.

42 Fourth. On account of liabilities to its stockholders for dividends and
 43 reserved profits.

44 SEC. 37. *And be it further enacted*, That no association shall, either directly
 45 or indirectly, pledge or hypothecate any of its notes of circulation, for the
 46 purpose of procuring money to be paid in on its capital stock, or to be used
 47 in its banking operations, or otherwise; nor shall any association use its
 48 circulating notes, or any part thereof, in any manner or form, to create or
 49 increase its capital stock.

50 SEC. 38. *And be it further enacted*, That no association, or any member
 51 thereof, shall, during the time it shall continue its banking operations,
 52 withdraw, or permit to be withdrawn, either in form of dividends or
 53 losses.

1 Bad debts. otherwise, any portion of its capital. And if losses shall at any time have
2 been sustained by any such association equal to or exceeding its undivided
3 profits then on hand, no dividend shall be made; and no dividend shall ever
4 What to be deemed bad debts. be made by any association, while it shall continue its banking operations, to
5 an amount greater than its net profits then on hand, deducting therefrom its
6 losses and bad debts. And all debts due to any association, on which interest
7 is past due and unpaid for a period of six months, unless the same shall be
8 well secured, and shall be in process of collection, shall be considered bad
9 debts within the meaning of this act: *Provided*, That nothing in this section
10 shall prevent the reduction of the capital stock of the association under the
11 thirteenth section of this act.

12 SEC. 39. *And be it further enacted*, That no associaiton shall at any time pay
13 out on loans or discounts, or in purchasing drafts or bills of exchange, or in
14 payment of deposits, or in any other mode pay or put in circulation the notes
15 of any bank or banking association which shall not, at any such time, be
16 receivable, at par, on deposit and in payment of debts by the association so
17 paying out or circulating such notes; nor shall it knowingly pay out or put in
18 circulation any notes issued by any bank or banking association which at the
19 time of such paying out or putting in circulation is not redeeming its
20 circulating notes in lawful money of the United States.

21 SEC. 40. *And be it further enacted*, That the president and cashier of every
22 such association shall cause to be kept at all times a full and correct list of
23 the names and residences of all the shareholders, in the association, and the
24 number of shares held by each, in the office where its business is transacted;
25 and such list shall be subject to the inspection of all the shareholders and
26 creditors of the association, and the officers authorized to assess taxes under
27 state authority, during business hours of each day in which business may be
28 legally transacted; and a copy of such list, on the first Monday of July in
each year, verified by the oath of such president or cashier, shall be
transmitted to the comptroller of the currency.

SEC. 41. *And be it further enacted*, That the plates and special dies to be
procured by the comptroller of the currency for the printing of such
circulating notes shall remain under his control and direction, and the
expenses necessarily incurred in executing the provisions of this act
respecting the procuring of such notes, and all other expenses of the bureau,
shall be paid out of the proceeds of the taxes or duties now or hereafter to be
assessed on the circulation, and collected from associations organized under
this act. And in lieu of all existing taxes, every association shall pay to the
treasurer of the United States, in the months of January and July, a duty of
one half of one per centum each half year from and after the first day of
January, eighteen hundred and sixty-four, upon the average amount of its
notes in circulation, and a duty of one quarter of one per centum each half
year upon the average amount of its deposits, and a duty of one quarter of
one per centum each half year, as aforesaid, on the average amount of its
capital stock beyond the amount invested in United States bonds; and in case
of default in the payment thereof by any association, the duties aforesaid
may be collected in the manner provided for the collection of United States
duties of other corporations, or the treasurer may reserve the amount of said
duties out of the interest, as it may become due, on the bonds deposited with
him by such defaulting association. And it shall be the duty of each
association, within ten days from the first days of January and July of each
year, to make a return, under the oath of its president or cashier, to the
treasurer of the United States, in such form as he may prescribe, of the
average amount of its notes in circulation, and of the average amount of its

deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding said first days of January and July as aforesaid, and in default of such return, and for each default thereof, each defaulting association shall forfeit and pay to the United States the sum of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States; and in case of such default the amount of the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the comptroller of the currency, and upon the highest amount of its deposits and capital stock, to be ascertained in such other manner as the treasurer may deem best: *Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: *Provided, further*, That the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located: *Provided, also*, That nothing in this act shall exempt the real estate associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed.

How associations may
be closed.
Proceedings.

SEC. 42. *And be it further enacted*, That any association may go into liquidation and be closed by the vote of its shareholders owning two thirds of its stock. And whenever such vote shall be taken it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the comptroller of the currency, and publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in a city or town in which the association is located, and if no newspaper be there published, then in the newspaper published nearest thereto, that said association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against the association for payment. And at any time after the expiration of one year from the time of the publication of such notice as aforesaid, the said association may pay over to the treasurer of the United States the amount of its outstanding notes in the lawful money of the United States, and take up the bonds which said association has on deposit with the treasurer for the security of its circulating notes; which bonds shall be assigned to the bank in the manner specified in the nineteenth section of this act, and from that time the outstanding notes of said association shall be redeemed at the treasury of the United States, and the said association and the shareholders thereof shall be discharged from all liabilities therefor.

Treasurer to execute
duplicate receipts.

Redeemed notes to be
mutilated, &c.

SEC. 43. *And be it further enacted*, That the treasurer, on receiving from an association lawful money for the payment and redemption of its outstanding notes, as provided for in the preceding section of this act, shall execute duplicate receipts therefor, one to the association and the other to the comptroller of the currency, stating the amount received by him, and the purpose for which it has been received, which amount shall be paid into the treasury of the United States, and placed to the credit of such association

upon redemption account. And it shall be the duty of the treasurer, whenever he shall redeem any of the notes of said association, to cause the same to be mutilated, and charged to the redemption account of said association; and all notes so redeemed by the treasurer shall, every three months, be certified to and burned in the manner prescribed in the twenty-fourth section of this act.

State banks may
become national
associations.
Mode of procedure.

SEC. 44. *And be it further enacted*, That any bank incorporated by special law, or any banking institution organized under a general law of any state, may, by authority of this act, become a national association under its provisions, by the name prescribed in its organization certificate; and in such case the articles of association and organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two thirds of the capital stock have authorized the directors to make such certificate and to change and convert the said bank or banking institution into a national association under this act. And a majority of the directors, after executing said articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before said conversion, and the directors aforesaid may be the directors of the association until others are elected or appointed in accordance with the provisions of this act; and any state bank which is a stockholder in any other bank, by authority of state laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this act. When the comptroller shall give to such association a certificate, under his hand and official seal, that the provisions of this act have been complied with, and that it is authorized to commence the business of banking under it, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects as are prescribed in this act for other associations organized under it, and shall be held and regarded as an association under this act: *Provided, however*, That no such association shall have a less capital than the amount prescribed for banking associations under this act.

Associations, when so
designated, may be
depositories of public
moneys, except, &c.;
may be financial
agents.
Designated
depositories to pay
promptly;

SEC. 45. *And be it further enacted*, That all associations under this act, when designated for that purpose by the Secretary of the Treasury, shall be depositories of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the government; and they shall perform all such reasonable duties, as depositories of public moneys and financial agents of the government, as may be required of them. And the Secretary of the Treasury shall require of the associations thus designated satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government: *Provided*, That every association which shall be selected and designated as receiver or depository of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid in to the government for internal revenue, or for loans or stocks.

to receive national
currency bills at par.

If associations fail to
redeem their
circulation, the notes
may be protested,
unless, &c.

SEC. 46. *And be it further enacted*, That if any such association shall at any time fail to redeem, in the lawful money of the United States, any of its circulating notes, when payment thereof shall be lawfully demanded, during the usual hours of business, at the office of such association, or at its place of redemption aforesaid, the holder may cause the same to be protested, in

1 Notices of protest,
2 &c., to be forwarded
3 to comptroller.

4 Association not to do
5 business further,
6 except, &c.

7 Notes not to be
8 protested in certain
9 cases,

10 Fees of notary.

11 Upon notice of failure
12 to redeem circulation,
13 comptroller to send
14 special agent to
15 ascertain facts,
16 when to declare
17 securities forfeited,
18 to notify holders of
19 notes to present them
20 for payment,
21 to pay notes and
22 cancel bonds.

23 The United States to
24 have priority of lien
25 upon assets for any
26 deficiency in
27 redemption of
28 circulation.

Bonds pledged as

one package, by a notary-public, unless the president or cashier of the association whose notes are presented for payment, or the president or cashier of the association at the place at which they are redeemable, shall offer to waive demand and notice of the protest, and shall, in pursuance of such offer, make, sign, and deliver to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of non-payment thereof; and such notary-public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the comptroller of the currency, retaining a copy thereof. And after such default, on examination of the facts by the comptroller, and notice by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits: *Provided*, That if satisfactory proof be produced to such notary-public that the payment of any such notes is restrained by order of any court of competent jurisdiction, such notary-public shall not protest the same; and when the holder of such notes shall cause more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.

SEC. 47. *And be it further enacted*, That on receiving notice that any such association has failed to redeem any of its circulating notes, as specified in the next preceding section, the comptroller of the currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent (of whose appointment immediate notice shall be given to such association) who shall immediately proceed to ascertain whether such association has refused to pay its circulating notes in the lawful money of the United States, when demanded as aforesaid, and report to the comptroller the fact so ascertained; and if, from such protest or the report so made, the comptroller shall be satisfied that such association has refused to pay its circulating notes as aforesaid and is in default, he shall, within thirty days after he shall have received notice of such failure, declare the United States bonds and securities pledged by such association forfeited to the United States, and the same shall thereupon be forfeited accordingly. And thereupon the comptroller shall immediately give notice in such manner as the Secretary of the Treasury shall, by general rules or otherwise, direct, to the holders of the circulating notes of such association to present them for payment at the treasury of the United States, and the same shall be paid as presented in lawful money of the United States; whereupon said comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid. And it shall be lawful for the Secretary of the Treasury, from time to time, to make such regulations respecting the disposition to be made of such circulating notes after presentation thereof for payment as aforesaid, and respecting the perpetuation of the evidence of the payment thereof as may seem to him proper; but all such notes, on being paid, shall be cancelled. And for any deficiency in the proceeds of the bonds pledged by such association, when disposed of as hereinafter specified, to reimburse to the United States the amount so expended in paying the circulating notes of such association, the United States shall have a first and paramount lien upon all the assets of such association; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same.

SEC. 48. *And be it further enacted*, That whenever the comptroller shall

1 security may be sold at become satisfied, as in the last preceding section specified, that any
 2 auction; association has refused to pay its circulating notes as therein mentioned, he
 3 may, instead of cancelling the United States bonds pledged by such
 4 them as necessary to redeem the outstanding circulating notes of such
 5 association to be sold at public auction in the city of New York, after giving
 6 thirty days' notice of such sale to such association.
 7 or at private sale. SEC. 49. *And be it further enacted*, That the comptroller of the currency
 8 may, if he shall be of opinion that the interests of the United States will be
 9 best promoted thereby, sell at private sale any of the bonds pledged by such
 10 association, and receive therefor either money or the circulating notes of
 11 such failing association: *Provided*, That no such bonds shall be sold by
 12 private sale for less than par, nor less than the market value thereof at the
 13 time of sale: *And provided, further*, That no sales of any such bonds, either
 14 public or private, shall be complete until the transfer thereof shall have been
 15 made with the formalities prescribed in this act.
 16 Proviso. SEC. 50. *And be it further enacted*, That on becoming satisfied, as specified
 17 in this act, that any association has refused to pay its circulating notes as
 18 therein mentioned, and is in default, the comptroller of the currency may
 19 forthwith appoint a receiver, and require of him such bond and security as he
 20 shall deem proper, who, under the direction of the comptroller, shall take
 21 possession of the books, records, and assets of every description of such
 22 association, collect all debts, dues, and claims belonging to such association,
 23 and, upon the order of a court of record of competent jurisdiction, may sell
 24 or compound all bad or doubtful debts, and, on a like order, sell all the real
 25 and personal property of such association, on such terms as the court shall
 26 direct; and may, if necessary to pay the debts of such association, enforce
 27 the individual liability of the stockholders provided for by the twelfth
 28 section of this act; and such receiver shall pay over all money so made to the
 treasurer of the United States, subject to the order of the comptroller of the
 currency, and also make report to the comptroller of the currency of all his
 acts and proceedings. The comptroller shall thereupon cause notice to be
 given, by advertisement in such newspapers as he may direct, for three
 consecutive months, calling on all persons who may have claims against
 such association to present the same, and to make legal proof thereof. And
 from time to time the comptroller, after full provision shall have been first
 made for refunding to the United States any such deficiency in redeeming
 the notes of such association as is mentioned in this act, shall make a ratable
 dividend of the money so paid over to him by such receiver on all such
 claims as may have been proved to his satisfaction or adjudicated in a court
 of competent jurisdiction; and from time to time, as the proceeds of the
 assets of such association shall be paid over to him, he shall make further
 dividends, as aforesaid, on all claims previously proved or adjudicated; and
 the remainder of such proceeds, if any, shall be paid over to the shareholders
 of such association, or their legal representatives, in proportion to the stock
 by them respectively held: *Provided, however*, That if such association
 against which proceedings have been so instituted, on account of any alleged
 refusal to redeem its circulating notes as aforesaid, shall deny having failed
 to do so, such association may, at any time within ten days after such
 association shall have been notified of the appointment of an agent, as
 provided in this act, apply to the nearest circuit, or district, or territorial
 court of the United States, to enjoin further proceedings in the premises; and
 such court, after citing the comptroller of the currency to show cause why
 further proceedings should not be enjoined, and after the decision of the

1 court or finding of a jury that such association has not refused to redeem its
 2 circulating notes, when legally presented, in the lawful money of the United
 3 States, shall make an order enjoining the comptroller, and any receiver
 acting under his direction, from all further proceedings on account of such
 alleged refusal.

4 SEC. 51. *And be it further enacted*, That all fees for protesting the notes
 5 issued by any such banking association shall be paid by the person procuring
 6 the protest to be made, and such banking association shall be liable therefor;
 7 but no part of the bonds pledged by such banking association, as aforesaid,
 shall be applied to the payment of such fees. And all expenses of any
 preliminary or other examinations into the condition of any association shall
 be paid by such association; and all expenses of any receivership shall be
 paid out of the assets of such association before distribution of the proceeds
 thereof.

8 SEC. 52. *And be it further enacted*, That all transfer of the notes, bonds, bills
 9 of exchange, and other evidences of debt owing to any association, or of
 10 deposits to its credit; all assignments of mortgages, sureties on real estate, or
 11 of judgments or decrees in its favor; all deposits of money, bullion, or other
 12 valuable thing for its use, or for the use of any of its shareholders or
 13 creditors; and all payments of money to either, made after the commission
 of an act of insolvency, or in contemplation thereof, with a view to prevent
 the application of its assets in the manner prescribed by this act, or with a
 view to the preference of one creditor to another, except in payment of its
 circulating notes, shall be utterly null and void.

14 SEC. 53. *And be it further enacted*, That if the directors of any
 15 association shall knowingly violate, or knowingly permit any of the
 16 officers, agents, or servants of the association to violate any of the
 17 provisions of this act, all the rights, privileges, and franchises of the
 18 association derived from this act shall be thereby forfeited. Such
 19 violation shall, however, be determined and adjudged by a proper
 circuit, district, or territorial court of the United States, in a suit
 brought for that purpose by the comptroller of the currency, in his own
 name, before the association shall be declared dissolved. And in cases of
 such violation, every director who participated in or assented to the
 same shall be held liable in his personal and individual capacity for all
 damages which the association, its shareholders, or any other person,
 shall have sustained in consequences of such violation.

20 SEC. 54. *And be it further enacted*, That the comptroller of the currency,
 21 with the approbation of the Secretary of the Treasury, as often as shall be
 22 deemed necessary or proper, shall appoint a suitable person or persons to
 23 make an examination of the affairs of every banking association, which
 24 person shall not be a director or other officer in any association whose
 25 affairs he shall be appointed to examine, and who shall have power to make
 26 a thorough examination into all the affairs of the association, and, in doing
 27 so, to examine any of the officers and agents thereof on oath; and shall make
 28 a full and detailed report of the condition of the association to the
 comptroller. And the association shall not be subject to any other visitorial
 powers than such as are authorized by this act, except such as are vested in
 the several courts of law and chancery. And every person appointed to make
 such examination shall receive for his services at the rate of five dollars for
 each day by him employed in such examination, and two dollars for every
 twenty-five miles he shall necessarily travel in the performance of his duty,
 which shall be paid by the association by him examined.

1 SEC. 55. *And be it further enacted*, That every president, director, cashier,
 2 teller, clerk, or agent of any association, who shall embezzle, abstract, or
 3 wilfully misapply any of the moneys, funds, or credits of the association, or
 4 shall, without authority from the directors, issue or put in circulation any of
 5 the notes of the association, or shall, without such authority, issue or put
 6 forth any certificate of deposit, draw any order or bill of exchange, make any
 7 acceptance, assign any note, bond, draft, bill of exchange, mortgage,
 8 judgment, or decree, or shall make any false entry in any book, report, or
 9 statement of the association, with intent, in either case, to injure or defraud
 10 the association or any other company, body politic or corporate, or any
 11 individual person, or to deceive any officer of the association, or any agent
 12 appointed to examine the affairs of any such association, shall be deemed
 13 guilty of a misdemeanor, and upon conviction thereof shall be punished by
 14 imprisonment not less than five nor more than ten years.

15 SEC. 56. *And be it further enacted*, That all suits and proceedings arising out
 16 of the provisions of this act, in which the United States or its officers or
 17 agents shall be parties, shall be conducted by the district attorneys of the
 18 several districts, under the direction and supervision of the solicitor of the
 19 treasury.

20 SEC. 57. *And be it further enacted*, That suits, actions, and proceedings,
 21 against any association under this act, may be had in any circuit, district, or
 22 territorial court of the United States held within the district in which such
 23 association may be established; or in any state, county, or municipal court in
 24 the county or city in which said association is located, having jurisdiction in
 25 similar cases: *Provided, however*, That all proceedings to enjoin the
 26 comptroller under this act shall be had in a circuit, district, or territorial court
 27 of the United States, held in the district in which the association is located.

28 SEC. 58. *And be it further enacted*, That every person who shall mutilate,
 cut, deface, disfigure, or perforate with holes, or shall unite or cement
 together, or do any other thing to any bank bill, draft, note, or other evidence
 of debt, issued by any such association, or shall cause or procure the same to
 be done, with intent to render such bank bill, draft, note, or other evidence of
 debt unfit to be reissued by said association, shall, upon conviction, forfeit
 fifty dollars to the association who shall be injured thereby, to be recovered
 by action in any court having jurisdiction.

SEC. 59. *And be it further enacted*, That if any person shall falsely make,
 forge, or counterfeit, or cause or procure to be made, forged, or
 counterfeited, or willingly aid or assist in falsely making, forging, or
 counterfeiting, any note in imitation of, or purporting to be in imitation of,
 the circulating notes issued under the provisions of this act, or shall pass,
 utter, or publish, or attempt to pass, utter, or publish, any false, forged, or
 counterfeited note, purporting to be issued by any association doing a
 banking business under the provisions of this act, knowing the same to be
 falsely made, forged, or counterfeited, or shall falsely alter, or cause or
 procure to be falsely altered, or willingly aid or assist in falsely altering, any
 such circulating notes, issued as aforesaid, or shall pass, utter, or publish, or
 attempt to pass, utter, or publish, as true, any falsely altered or spurious
 circulating note issued, or purporting to have been issued, as aforesaid,
 knowing the same to be falsely altered or spurious, every such person shall
 be deemed and adjudged guilt of felony, and being thereof convicted by due
 course of law shall be sentenced to be imprisoned and kept at hard labor for
 a period of not less than five years, nor more than fifteen years, and fined in
 a sum not exceeding one thousand dollars.

for engraving, &c.,
plates for forging
notes, &c.,
for having blank notes,
&c., with intent,
for having paper, &c.

SEC. 60. *And be it further enacted*, That if any person shall make or engrave, or cause or procure to be made or engraved, or shall have in his custody or possession any plate, die, or block after the similitude of any plate, die, or block from which any circulating notes issued as aforesaid shall have been prepared or printed, with intent to use such plate, die, or block, or cause or suffer the same to be used, in forging or counterfeiting any of the notes issued as aforesaid, or shall have in his custody or possession any blank note or notes engraved and printed after the similitude of any notes issued as aforesaid, with intent to use such blanks, or cause or suffer the same to be used, in forging or counterfeiting any of the notes issued as aforesaid, or shall have in his custody or possession any paper adapted to the making of such notes, and similar to the paper upon which any such notes shall have been issued, with intent to use such paper, or cause or suffer the same to be used, or forging or counterfeiting any of the notes issued as aforesaid, every such person, being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labor for a term not less than five or more than fifteen years, and fined in a sum not exceeding one thousand dollars.

Comptroller to report
annually to congress.

SEC. 61. *And be it further enacted*, That it shall be the duty of the comptroller of the currency to report annually to congress at the commencement of its session —

Contents of report.

Contents of
comptroller's report to
congress.

First. A summary of the state and condition of every association from whom reports have been received the preceding year, at several dates to which such reports refer, with an abstract of the whole amount of banking capital returned by them, of the whole amount of their debts and liabilities, the amount of circulating notes outstanding, and the total amount of means and resources, specifying the amount of lawful money held by them at the times of their several returns, and such other information in relation to said associations as, in his judgment, may be useful.

Second. A statement of the associations whose business has been closed during the year, with the amount of their circulation redeemed and the amount outstanding.

Third. Any amendment to the laws relative to banking by which the system may be improved, and the security of the holders of its notes and other creditors may be increased.

Fourth. The names and compensation of the clerks employed by him, and the whole amount of the expenses of the banking department during the year. And such report shall be made by or before the first day of December in each year, and the usual number of copies for the use of the senate and house, and one thousand copies for the use of the department, shall be printed by the public printer and in readiness for distribution at the first meeting of congress.

Repeal of act of 1863,
ch. 58.
Vol. xii. p. 665.
Saving clauses.

SEC. 62. *And be it further enacted*, That the act entitled "An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February twenty-fifth, eighteen hundred and sixty-three, is hereby repealed: *Provided*, That such repeal shall not effect any appointments made, acts done, or proceedings had, or the organization, acts, or proceedings of any association organized or in the process of organization under the act aforesaid: *And provided, also*, That all such associations so organized or in process of organization shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities, and restrictions imposed by this act, and with the approval of the comptroller of the currency, in lieu of the name specified in

their respective organization certificates, may take any other name preferred by them and duly certified to the comptroller, without prejudice to any right acquired under this act, or under the act hereby repealed; but no such change shall be made after six months from the passage of this act: *Provided, also*, That the circulation issued or to be issued by such association shall be considered as a part of the circulation provided for in this act.

Executors, trustees,
&c., holding stock, not
to be personally liable.

SEC. 63. *And be it further enacted*, That persons holding stock as executors, administrators, guardians, and trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in said trust-funds would be if they were respectively living and competent to act and hold the stock in their own names.

Act may be altered or
repealed.

SEC. 64. *And be it further enacted*, That congress may at any time amend, alter, or repeal this act.

Approved, June 3, 1864.

CONCLUSION

Plaintiff respectfully seeks this Court to do their constitutional duty (Oath) that this Court is required to under their Constitutional oath to protect and defend the Constitutional rights of the individual against this corporate giant and ask this Court to protect the Plaintiffs rights according to the "Law of the land," "due process of law," and "due course of law" are synonymous. *People v. Skinner, Cal., 110 P.2d 41, 45; State v. Rossi, 71, R.I. 284, 2d 323, 326; Direct Plumbing Supply Company v. City of Dayton, 138 Ohio St. 540, 38 N.E. 2d 70, 72, 137 A.L.R. 1058; Stoner v. Higginson, 316 Pa. 481, 175 A. 527, 531.*

All litigants have a Constitutional right to have their claims adjudicated according to the rule of precedent. *See: Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000).*

1 The Plaintiff never knew that Plaintiff was entering into a non-judicial foreclosure
2 contract and was never advised about unknowingly waving Federal and State
3 Constitutional rights to have a trial by Jury. "We are bound to interpret the
4 Constitution in the light of the law as it existed at the time it was adopted." *Mattox v.*
5 *U.S., 86 S.Ct. 237 (1938).*

6 "Nothing can be more material to the obligation than the means of
7 enforcement. Without the remedy the contract may, indeed, in the sense of the law, be
8 said not to exist, and its obligation to fall within the class of those moral and social duties
9 which depend for their fulfillment wholly upon the will of the individual. The ideas of
10 validity and remedy are inseparable, and both are parts of the obligation, which is
11 guaranteed by the Constitution against invasion. The obligation of a contract 'is the
12 law which binds the parties to perform their agreement.' *RED CROSS LINE vs.*
13 *ATLANTIC FRUIT COMPANY. 264 U.S. 109, 68 L. Ed. 582, 44 S. Ct. 274 February 18,*
14 *1924 Decided.*

15
16
17
18 For want of all of the above, Plaintiff now seeks this honorable Court's immediate
19 intervention for the re-establishment and/or protection of Plaintiff's rights. Plaintiff
20 believes, in consideration of all of the foregoing, that Plaintiff has established just and
21 proper cause for this Court to immediately intervene, by enjoining Defendants from any
22 further action, lest further, irreparable harm and injury, and loss of property befall
23 Plaintiff; and, to further issue declaratory relief consistent herewith.

24
25 WHEREAS; Plaintiff states the claims, and as an offer of proof, hereby accuses
26 Defendant of committing acts of perjury by; Defendant claiming to be in possession of the
27 GENUINE ORIGINAL PROMISSORY NOTE; and Defendant claiming to be the
28

1 GENUINE HOLDER IN DUE COURSE; and the Defendant claiming to be the
2 **CREDITOR.**

3 **THEREFORE;** Defendants MUST present for inspection to Plaintiff and this
4 court the GENUINE ORIGINAL PROMISSORY NOTE or Defendants MUST agree to
5 Judgment by Default in favor of Plaintiff.

6 **FURTHERMORE;** Plaintiff states the claim: "the GENUINE ORIGINAL
7 PROMISSORY NOTE does not exist," accordingly there is **NO** GENUINE HOLDER IN
8 DUE COURSE, Defendant is NOT the GENUINE HOLDER IN DUE COURSE and
9 Defendant is NOT the **CREDITOR** in this instant matter; and therefore no entity has the
10 right to foreclose on the Plaintiff's real property in question in this instant matter.

11 **ALSO FURTHERMORE;** Plaintiff states the claim the GENUINE ORIGINAL
12 PROMISSORY NOTE was "purposely destroyed" by Defendant in furtherance of
13 Defendants' fraudulent and unlawful acts to "securitize" the NOTE.

14 **ALSO FURTHERMORE;** Plaintiff states the claim Defendant has committed
15 fraud and is committing fraud upon the court by claiming a COPY OF A PROMISSORY
16 NOTE as a GENUINE ORIGINAL PROMISSORY NOTE, and claiming to be the
17 **CREDITOR** regarding this issue.

18 **ALSO FURTHERMORE;** Plaintiff respectfully prays this court to grant Plaintiff
19 declaratory and injunctive relief, consistent with the findings of the aforesaid, including,
20 but not limited to, enjoining the above-named Defendants, as well as any party, yet
21 unnamed Defendant(s), from Selling, Converting, or, by any means whatsoever,
22 Dispossessing Plaintiff of Property, until all Facts, are Clarified, as to be determined
23 following the completion of discovery, which is now pending, and, to provide Plaintiff,
24 thereafter, Oral Argument, and/or any other relief this court deems just and proper.

25 **RESPECTFULLY SUBMITTED:** This 2nd day of April, 2010.
26
27
28

1 BY: James L. Macklin, Agent
2 James L. Macklin, *pro se*
3 Signed reserving all my rights at UCC 1-308
4 James L. Macklin, *pro se*
5 10040 Wise Rd
6 Auburn, Calif., 95603
7 916-798-0857
8 jimmacklin@sbcglobal.net

9 **VERIFICATION OF James L. Macklin**

10 I, James L. Macklin, declare as follows:

- 11 1. I am named as the Plaintiff in the above-entitled matter.
12 2. I have read the foregoing COMPLAINT and know the facts therein stated to be true
13 and correct.
14 3. I declare, under penalty of perjury pursuant to the laws of the United States of
15 America, that the foregoing is true and correct to the best of my knowledge and
16 belief.

17 James L. Macklin
18 James L. Macklin, *pro per*

19 **CERTIFICATE OF SERVICE**

20 **ORIGINAL** and **ONE COPY** delivered to Placer County Superior Court
21 this 2nd day of April, 2010.

22 I HEREBY CERTIFY that a true and correct copy of the above COMPLAINT has
23 been furnished by certified U.S. Mail on this 2nd day of April, 2010 to:

24 Certified Mail Return Receipt # 7009 2250 0004 3571 3763
25 Select Portfolio Servicing, Inc.
26 ATTN: **MATTHEW HOLLINGSWORTH, LINDA FELLER** and/or his/her
27 successor
28 3815 S.W. Temple
Salt Lake City, Utah, 84115-4412

1 Certified Mail Return Receipt # 7009 2250 0004 3571 3770
2 Deutsche Bank National Trust Co., As Indenture Trustee.
3 ATTN: **ROBERT J. JACKSON, ATTORNEY, AGENT, and/or his successor**
4 1761 Saint Andrews Place
5 Santa Ana, CA 92705

6 Certified Mail Return Receipt # 7009 2250 0004 3571 3787
7 Mortgage Electronic Registration Systems, Inc.,
8 Attn: **R.K. Arnold and/or his successor**
9 P.O. Box 2026, Flint, Mi., 48501-2026

10 BY: James L. Macklin, agent
11 James L. Macklin, *pro se*
12 Signed reserving all my rights at UCC 1-308
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CASE NO. ---

S CV 26905

A CASE MANAGEMENT CONFERENCE HAS BEEN SCHEDULED:

DATE: August 3, 2010

TIME: 10:00 A.M. If your case number starts with "S-CV"

11:00 A.M. If your case number starts with "M-CV"

DEPT: 40 - 10820 Justice Center Drive, Roseville, California

RECEIVED
APR 07 2010
BY:

IF YOU DO NOT HAVE AN ATTORNEY, READ THIS:

The judge does not decide whether you win or lose your case at this court date. If you do not file an "Answer," or other "responsive pleading," you will automatically lose this case, usually before this court date. The Answer or responsive pleading must be given to the court clerk within 30 days of the day you received the Summons, along with a filing fee or application for waiver of court fees.

You can get free help filling out your Answer or responsive pleading at the court's Legal Help Center. Call 916-408-6446 or go to the court's website at www.placercourts.org and select "Legal Help Center/Self Help" for information about the Legal Help Center.

INFORMATION ABOUT CASE MANAGEMENT CONFERENCES:

Fifteen calendar days before the Case Management Conference, you must file and serve a completed Case Management Statement (CM-110).

You do not need to come to court for the first Case Management Conference. You can see the court's proposed orders 12 calendar days before the Case Management Conference on the court's website, www.placercourts.org. Select "Tentative Rulings and Calendar Notes", then "Civil CMC." If you do not have Internet access, call the court at 916-408-6000 to get the information.

At the First Case Management Conference, the court will make orders which may include: redesignating the class currently assigned; exempting the case from dispositional time goals; referring the case to arbitration; transferring the case to Limited Jurisdiction; assigning the case to a particular judge for all purposes; assigning a trial date; assigning the case as a short cause trial matter; identifying the case as one which may be protracted; identifying the case as one which may be amenable to early settlement; establishing a discovery cut-off; scheduling the exchange of expert witness information; scheduling a mandatory settlement conference; scheduling a final case management conference; or, other orders to achieve the interests of justice and timely disposition of the case.

The court does not provide a court reporter at Case Management Conferences or Law & Motion hearings. If you want the proceedings reported, you must provide your own court reporter at your own expense.

IF YOU WANT TO APPEAR BY TELEPHONE, YOU MUST CONTACT COURT CALL TOLL FREE, AT 888-832-6878, AT LEAST TWO (2) COURT DAYS PRIOR TO THE APPEARANCE TO ARRANGE FOR THIS. YOU MUST PAY COURT CALL TO USE THIS SERVICE UNLESS YOU HAVE BEEN GRANTED A FEE WAIVER BY THE COURT.

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): James L. Macklin, In Pro Per 10040 Wise Rd. Auburn, Calif., 95603		FOR COURT USE ONLY	
TELEPHONE NO.: 916-798-0857	FAX NO.:		
ATTORNEY FOR (Name): SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER STREET ADDRESS: PO Box 619072 MAILING ADDRESS: CITY AND ZIP CODE: Roseville, Ca., 95661-9072 BRANCH NAME: Bill Santucci Justice Ctr.			
CASE NAME: Macklin v. Matthew Hollingsworth et al.			
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000) <input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)		Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	CASE NUMBER: SLV 26905
		JUDGE:	DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other P/PI/D/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other P/PI/D/WD (23) Non-P/PI/D/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-P/PI/D/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (28) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input checked="" type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
--	--	--

2. This case ☒ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|---|
| a. <input checked="" type="checkbox"/> Large number of separately represented parties | d. <input checked="" type="checkbox"/> Large number of witnesses |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input checked="" type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input checked="" type="checkbox"/> Substantial amount of documentary evidence | f. <input type="checkbox"/> Substantial postjudgment judicial supervision |
3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action (specify): Three(3)
5. This case ☐ is ☒ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: April 5th, 2010
James L. Macklin

(TYPE OR PRINT NAME)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

SUM-100

SUMMONS
(CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

Linda Feller, or successor C.F.O.

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

James L. Macklin

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.

¡AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):

Placer County Superior Court, Bill Santucci Justice Ctr.
10820 Justice Ctr. Dr., Roseville, Ca., 95678

CASE NUMBER:
(Número del Caso):

SCV 26905

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
James L. Macklin, 670 Auburn-Folsom Rd. #106-303, Auburn, Cal., 95603, 916-798-0857

DATE: April 5th, 2010
(Fecha)

Clerk, by _____, Deputy
(Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. ☒ as an individual defendant.
2. ☒ as the person sued under the fictitious name of (specify):
Select Portfolio Servicing, Inc.

3. ☐ on behalf of (specify):

under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other (specify):

4. ☐ by personal delivery on (date):

SUM-100

SUMMONS
(CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

Matthew Hollingsworth

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

James L. Macklin

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form. If you want the court to hear your case, there may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **[AVISO!] Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.**

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 o más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):

Superior Court of California, Placer County
10820 Justice Ctr. Dr., Roseville, Ca., 95678

CASE NUMBER:
(Número del Caso):

SCV 26905

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

James L. Macklin, 670 Auburn-Folsom Rd. #106-303, Auburn, Calif., 95603

DATE: April 5th, 2010
(Fecha)

Clerk, by
(Secretario)

Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

(SEAL)

NOTICE TO THE PERSON SERVED: You are served

1. ☒ as an individual defendant.
2. ☒ as the person sued under the fictitious name of (specify):

Select Portfolio Servicing, Inc.

3. ☐ on behalf of (specify):

under: ☐ CCP 416.10 (corporation)

☐ CCP 416.20 (defunct corporation)

☐ CCP 416.40 (association or partnership)

☐ other (specify):

☐ CCP 416.60 (minor)

☐ CCP 416.70 (conservatee)

☐ CCP 416.90 (authorized person)

4. ☐ by personal delivery on (date):

Page 1 of 1

CM-015

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): James L. Macklin, In Pro Per 10040 Wise Rd. Auburn, Calif., 95603 TELEPHONE NO.: 916-798-0857 FAX NO. (Optional): E-MAIL ADDRESS (Optional): jimmacklin@sbcglobal.net ATTORNEY FOR (Name):		FOR COURT USE ONLY	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER STREET ADDRESS: PO Box 619072 MAILING ADDRESS: Roseville, Ca., 95661-9072 CITY AND ZIP CODE: BRANCH NAME: Bill Santucci Justice Ctr.			
PLAINTIFF/PETITIONER: James L. Macklin		CASE NUMBER: SCV 26905	
DEFENDANT/RESPONDENT: Matthew Hollingsworth, et al.		JUDICIAL OFFICER:	
NOTICE OF RELATED CASE		DEPT.:	

Identify, in chronological order according to date of filing, all cases related to the case referenced above.

1. a. Title: Deutsche Bank v. Jason Macklin; et al.
b. Case number: MCV 45238
c. Court: ☒ same as above
☐ other state or federal court (name and address):
d. Department: Not Specified
e. Case type: ☒ limited civil ☐ unlimited civil ☐ probate ☐ family law ☐ other (specify):
f. Filing date: Mar. 26, 2010
g. Has this case been designated or determined as "complex?" ☐ Yes ☒ No
h. Relationship of this case to the case referenced above (check all that apply):
☐ involves the same parties and is based on the same or similar claims.
☐ arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact.
☒ involves claims against, title to, possession of, or damages to the same property.
☐ is likely for other reasons to require substantial duplication of judicial resources if heard by different judges.
☐ Additional explanation is attached in attachment 1h
i. Status of case:
☒ pending
☐ dismissed ☐ with ☐ without prejudice
☐ disposed of by judgment
2. a. Title:
b. Case number:
c. Court: ☐ same as above
☐ other state or federal court (name and address):
d. Department:

CM-015

PLAINTIFF/PETITIONER: James L. Macklin	CASE NUMBER:
DEFENDANT/RESPONDENT: Matthew Hollingsworth, et al.	

2. (continued)

- e. Case type: ☐ limited civil ☐ unlimited civil ☐ probate ☐ family law ☐ other (specify):
- f. Filing date:
- g. Has this case been designated or determined as "complex?" ☐ Yes ☐ No
- h. Relationship of this case to the case referenced above (check all that apply):
- ☐ involves the same parties and is based on the same or similar claims.
- ☐ arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact.
- ☐ involves claims against, title to, possession of, or damages to the same property.
- ☐ is likely for other reasons to require substantial duplication of judicial resources if heard by different judges.
- ☐ Additional explanation is attached in attachment 2h
- i. Status of case:
- ☐ pending
- ☐ dismissed ☐ with ☐ without prejudice
- ☐ disposed of by judgment

3. a. Title:

b. Case number:

c. Court: ☐ same as above

☐ other state or federal court (name and address):

d. Department:

e. Case type: ☐ limited civil ☐ unlimited civil ☐ probate ☐ family law ☐ other (specify):

f. Filing date:

g. Has this case been designated or determined as "complex?" ☐ Yes ☐ No

h. Relationship of this case to the case referenced above (check all that apply):

- ☐ involves the same parties and is based on the same or similar claims.
- ☐ arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact.
- ☐ involves claims against, title to, possession of, or damages to the same property.
- ☐ is likely for other reasons to require substantial duplication of judicial resources if heard by different judges.
- ☐ Additional explanation is attached in attachment 3h

i. Status of case:

- ☐ pending
- ☐ dismissed ☐ with ☐ without prejudice
- ☐ disposed of by judgment

4. ☐ Additional related cases are described in Attachment 4. Number of pages attached: _____

Date: April 5th, 2010

James L. Macklin

(TYPE OR PRINT NAME OF PARTY OR ATTORNEY)

(SIGNATURE OF PARTY OR ATTORNEY)

CM-015

PLAINTIFF/PETITIONER: James L. Macklin DEFENDANT/RESPONDENT: Matthew Hollingsworth, et al.	CASE NUMBER:
---	--------------

**PROOF OF SERVICE BY FIRST-CLASS MAIL
NOTICE OF RELATED CASE**

(NOTE: You cannot serve the Notice of Related Case if you are a party in the action. The person who served the notice must complete this proof of service. The notice must be served on all known parties in each related action or proceeding.)

1. I am at least 18 years old and **not a party to this action**. I am a resident of or employed in the county where the mailing took place, and my residence or business address is (specify):
965 Kidder Ct., Auburn, Calif., 95603 (Home)
2. I served a copy of the *Notice of Related Case* by enclosing it in a sealed envelope with first-class postage fully prepaid and (check one):
 - a. ☒ deposited the sealed envelope with the United States Postal Service.
 - b. ☐ placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.
3. The *Notice of Related Case* was mailed:
 - a. on (date): April 5th, 2010
 - b. from (city and state): Auburn, Calif.
4. The envelope was addressed and mailed as follows:
 - a. Name of person served:
Matthew Hollingsworth
Street address: 3815 Temple
City: Salt Lake City
State and zip code: Utah, 84115-4412
 - b. Name of person served:
R.K. Arnold/M.E.R.S.
Street address: PO Box 2026
City: Flint
State and zip code: Mi., 48501-2026
 - c. Name of person served:
Robert J. Jackson, Agent for Deutsche Bank Nat'l Trust
Street address: 1761 Saint Andrews Pl.
City: Santa Ana
State and zip code: Ca., 92705
 - d. Name of person served:
Street address:
City:
State and zip code:


☐ Names and addresses of additional persons served are attached. (You may use form POS-030(P).)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: April 5th, 2010

Victoria D. Sweigart

(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

POS-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): James L. Macklin 10040 Wise Rd. Auburn, Calif., 95603 In Pro Per TELEPHONE NO.: 916-798-0857 FAX NO. (Optional): E-MAIL ADDRESS (Optional): jimmacklin@sbcglobal.net ATTORNEY FOR (Name):		FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER STREET ADDRESS: PO Box 619072 MAILING ADDRESS: CITY AND ZIP CODE: Roseville, Ca., 95661-9072 BRANCH NAME: BillSantucci Justice Ctr.		
PLAINTIFF/PETITIONER: James L. Macklin, In Pro Per DEFENDANT/RESPONDENT: Select Portfolio Servicing, Inc.		CASE NUMBER: SCV 26905
PROOF OF SERVICE OF SUMMONS		Ref. No. or File No.:

(Separate proof of service is required for each party served.)

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of:
 - a. ☒ summons
 - b. ☒ complaint
 - c. ☐ Alternative Dispute Resolution (ADR) package
 - d. ☐ Civil Case Cover Sheet (served in complex cases only)
 - e. ☐ cross-complaint
 - f. ☐ other (specify documents):
3. a. Party served (specify name of party as shown on documents served):
"SPS, Inc.", Matthew Hollingsworth, Pres., C.E.O., Agent and in his individual capacity
b. ☐ Person (other than the party in item 3a) served on behalf of an entity or as an authorized agent (and not a person under item 5b on whom substituted service was made) (specify name and relationship to the party named in item 3a):
4. Address where the party was served:
3815 Temple, Salt Lake City, Ut., 84115-4412
5. I served the party (check proper box)
 - a. ☐ by personal service. I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on (date): (2) at (time):
 - b. ☐ by substituted service. On (date): at (time): I left the documents listed in item 2 with or in the presence of (name and title or relationship to person indicated in item 3):
 - (1) ☐ (business) a person at least 18 years of age apparently in charge at the office or usual place of business of the person to be served. I informed him or her of the general nature of the papers.
 - (2) ☐ (home) a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the party. I informed him or her of the general nature of the papers.
 - (3) ☐ (physical address unknown) a person at least 18 years of age apparently in charge at the usual mailing address of the person to be served, other than a United States Postal Service post office box. I informed him or her of the general nature of the papers.
 - (4) ☐ I thereafter mailed (by first-class, postage prepaid) copies of the documents to the person to be served at the place where the copies were left (Code Civ. Proc., § 415.20). I mailed the documents on (date): from (city): or ☐ a declaration of mailing is attached.
 - (5) ☐ I attach a declaration of diligence stating actions taken first to attempt personal service.

PLAINTIFF/PETITIONER: James L. Macklin, In Pro Per	CASE NUMBER:
DEFENDANT/RESPONDENT: Select Portfolio Servicing, Inc.	SCV 26905

5. a. ☒ by mail and acknowledgment of receipt of service. I mailed the documents listed in item 2 to the party, to the address shown in item 4, by first-class mail, postage prepaid,
- (1) on (date): April 2nd, 2010 (2) from (city): Auburn, Calif.
- (3) ☐ with two copies of the Notice and Acknowledgment of Receipt and a postage-paid return envelope addressed to me. (Attach completed Notice and Acknowledgement of Receipt.) (Code Civ. Proc., § 415.30.)
- (4) ☒ to an address outside California with return receipt requested. (Code Civ. Proc., § 415.40.)
- d. ☐ by other means (specify means of service and authorizing code section):

☐ Additional page describing service is attached.

6. The "Notice to the Person Served" (on the summons) was completed as follows:
- a. ☐ as an individual defendant.
- b. ☒ as the person sued under the fictitious name of (specify): Select Portfolio Servicing, Inc.
- c. ☐ as occupant.
- d. ☐ On behalf of (specify):
- under the following Code of Civil Procedure section:
- | | |
|---|---|
| <input type="checkbox"/> 416.10 (corporation) | <input type="checkbox"/> 415.95 (business organization, form unknown) |
| <input type="checkbox"/> 416.20 (defunct corporation) | <input type="checkbox"/> 416.60 (minor) |
| <input type="checkbox"/> 416.30 (joint stock company/association) | <input type="checkbox"/> 416.70 (ward or conservatee) |
| <input type="checkbox"/> 416.40 (association or partnership) | <input type="checkbox"/> 416.90 (authorized person) |
| <input type="checkbox"/> 416.50 (public entity) | <input type="checkbox"/> 415.46 (occupant) |
| | <input type="checkbox"/> other: |

7. Person who served papers

- a. Name: Victoria D. Sweigart
- b. Address: 965 Kidder Ct., Auburn, Calif., 95603
- c. Telephone number: 916-390-0151
- d. The fee for service was: \$ 0
- e. I am:
- (1) ☒ not a registered California process server.
- (2) ☐ exempt from registration under Business and Professions Code section 22350(b).
- (3) ☐ a registered California process server:
- (i) ☐ owner ☐ employee ☐ independent contractor.
- (ii) Registration No.:
- (iii) County:

8. ☒ I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

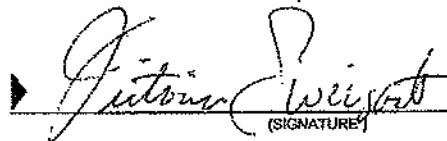
or

9. ☐ I am a California sheriff or marshal and I certify that the foregoing is true and correct.

Date: April 2nd, 2010

Victoria D. Sweigart

(NAME OF PERSON WHO SERVED PAPERS/SHERIFF OR MARSHAL)


(SIGNATURE)

POS-015

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): James L. Macklin, In Pro Per 10040 Wise Rd. Auburn, Calif., 95603 TELEPHONE NO.: 916-798-0857 FAX NO. (Optional): E-MAIL ADDRESS (Optional): jimmacklin@sbcglobal.net ATTORNEY FOR (Name):		FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER STREET ADDRESS: PO Box 619072 MAILING ADDRESS: CITY AND ZIP CODE: Roseville, Ca., 95661-9072 BRANCH NAME: Bill Santucci Justice Ctr.		
PLAINTIFF/PETITIONER: James L. Macklin, Pro Per DEFENDANT/RESPONDENT: Deutsche Bank Nat'l Trust Co., as Indenture Trustee		
NOTICE AND ACKNOWLEDGMENT OF RECEIPT—CIVIL		CASE NUMBER: SCV 269D5

TO (insert name of party being served): Matthew Hollingsworth, Pres., C.E.O.

NOTICE

The summons and other documents identified below are being served pursuant to section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it within 20 days from the date of mailing shown below may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, an unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below.

Date of mailing: April 2nd, 2010

Victoria D. Sweigart

(TYPE OR PRINT NAME)

(SIGNATURE OF SENDER—MUST NOT BE A PARTY IN THIS CASE)

ACKNOWLEDGMENT OF RECEIPT

This acknowledges receipt of (to be completed by sender before mailing):

- ☒ A copy of the summons and of the complaint.
- ☐ Other (specify):

(To be completed by recipient):

Date this form is signed:

(TYPE OR PRINT YOUR NAME AND NAME OF ENTITY, IF ANY,
ON WHOSE BEHALF THIS FORM IS SIGNED)

(SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF
ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)

POS-015

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): James L. Macklin, In Pro Per 10040 Wise Rd. Auburn, Calif., 95603 TELEPHONE NO.: 916-798-0857 FAX NO. (Optional): E-MAIL ADDRESS (Optional): jimmacklin@sbcglobal.net ATTORNEY FOR (Name):		FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER STREET ADDRESS: PO Box 619072 MAILING ADDRESS: CITY AND ZIP CODE: Roseville, Ca., 95661-9072 BRANCH NAME: Bill Santucci Justice Ctr.		
PLAINTIFF/PETITIONER: James L. Macklin, Pro Per DEFENDANT/RESPONDENT: Deutsche Bank Nat'l Trust Co., as Indenture Trustee		
NOTICE AND ACKNOWLEDGMENT OF RECEIPT—CIVIL		CASE NUMBER: SCV 26A05

TO (insert name of party being served): Matthew Hollingsworth, Pres., C.E.O.

NOTICE


The summons and other documents identified below are being served pursuant to section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it within 20 days from the date of mailing shown below may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, an unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below.

Date of mailing: April 2nd, 2010

Victoria D. Sweigart

(TYPE OR PRINT NAME)


(SIGNATURE OF SENDER—MUST NOT BE A PARTY IN THIS CASE)

ACKNOWLEDGMENT OF RECEIPT

This acknowledges receipt of (to be completed by sender before mailing):

- ☒ A copy of the summons and of the complaint.
- ☐ Other (specify):

(To be completed by recipient):

Date this form is signed:

(TYPE OR PRINT YOUR NAME AND NAME OF ENTITY, IF ANY,
ON WHOSE BEHALF THIS FORM IS SIGNED)

(SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF
ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)

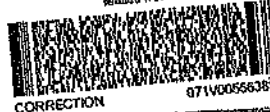
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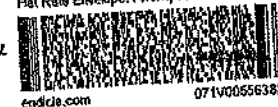
\$5.10 US POSTAGE
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From/Expéditeur:

To/Destination:

SELECT PORTFOLIO SERVICES, INC
 ATTN: MATTHE HOLLINGSWORTH
 3815 TEMPLE
 SALT LAKE CITY, UT 84115-4412

Country of Destination/Pays de destination:



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EXHIBIT B

EXHIBIT B

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Lori A. Lutzker (Bar No. 124589)
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CARR, McCLELLAN, INGERSOLL, THOMPSON & HORN
Professional Law Corporation
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P.O. Box 513
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Telephone: (650) 342-9600
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Attorneys for Defendants Matthew Hollingsworth, Robert J.
Jackson, Amy E. Starrett, and R.K. Arnold

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

James L. Macklin, *pro se*,

Plaintiff,

Vs.

Matthew Hollingsworth, *and/or his
successor*, individually, and in his official
capacity as **C.E.O. OF SELECT
PORTFOLIO SERVICING, INC.**, *an ens
legis being used to conceal fraud*,

LINDA FELLER, *and/or her successor,
individually and in her official capacity as
C.F.O. OF SELECT PORTFOLIO
SERVICING, INC.*, *an ens legis being used
to conceal fraud*,

**ROBERT J. JACKSON, AMY E.
STARRETT**, *and/or his/her successor*,
individually, and in his/her official capacity as
**ATTORNEY, AGENT OF DEUTSCHE
BANK NATIONAL TRUST CO., AS
INDENTURE TRUSTEE, OR ITS'
PREDECESSORS OR ASSIGNS**, *an ens
legis being used to conceal fraud*,

R.K. ARNOLD, *and/or his successor,
individually and in his official capacity as
PRES./C.E.O. OF MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC.*, *as an ens legis being used
to conceal fraud*,

Case No.

**NOTICE OF REMOVAL OF ACTION
UNDER 28 U.S.C. §1441(b) (FEDERAL
QUESTION AND DIVERSITY)**

1 **AND DOES (Investors) 1-10,000, et al,**
2 Defendant.

3 TO THE CLERK OF THE ABOVE-ENTITLED COURT:

4 PLEASE TAKE NOTICE that Defendants Matthew Hollingsworth, Robert J. Jackson,
5 Amy E. Starrett, and R.K. Arnold hereby remove to this Court the state court action described
6 below.

7 1. Defendants first received notice of this action on or about, April 7, 2010, when
8 Defendant Matthew Hollingsworth received by certified mail a copy of the Summons and
9 Complaint in Case No. SCV 29605, entitled *James L. Macklin, pro se, v. Matthew Hollingsworth,*
10 *et al.*, pending in the Superior Court of California for the County of Placer (the “State Court
11 Action”). Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings, and orders in the
12 State Court Action that have been served upon Defendant Hollingsworth is attached as **Exhibit A**.
13 Defendants initiated this removal within 30 days, as required by 28 U.S.C. § 1446(b).

14 2. Defendant R.K. Arnold received a copy of the Summons and Complaint on April
15 12, 2010. Defendants Robert J. Jackson and Amy Starrett received a copy of the Summons and
16 Complaint on April 29, 2010. Defendant Linda Feller, identified in the complaint’s caption as the
17 C.F.O. of Select Portfolio Servicing, Inc.(a Utah corporation with its principal place of business
18 in Salt Lake City, Utah), has not been served. Linda Feller, in fact, is unknown to Select Portfolio
19 Servicing, Inc— she is not and has never been an employee Select Portfolio Servicing, Inc.

20 JURISDICTION

21 3. This action is a civil action of which this Court has original jurisdiction under 28
22 U.S.C. §1331 and is one which may be removed to this Court by Defendants pursuant to the
23 provisions of 28 U.S.C. §1441(b) in that it appears to be based on the United States Constitution
24 (see, e.g., Complaint pp. 31:3-32:7); 18 U.S.C. §§ 241,1341, 1343, 1961, 1962, 1964, 1983, 1985,
25 1986 (*Id.* at pp. 90:25-92:13); and the National Bank Act (*Id.* at pp. 104:4-124:9).

26 4. Alternatively or in addition, this action is a civil action of which this Court has
27 original jurisdiction under 28 U.S.C. §1332 and is one which may be removed to this Court by
28

1 Defendants pursuant to the provisions of 28 U.S.C. §1441(b) in that it is a civil action between a
2 citizen of different states and the matter in controversy exceeds \$75,000 exclusive of interest and
3 costs.

4 5. The Complaint does not contain any jurisdictional allegations regarding Plaintiff
5 or of Defendants. However, diversity is present because Plaintiff James Macklin is a citizen of
6 California, Defendant Matthew Hollingsworth is a citizen of Utah, and Defendant R. K. Arnold is
7 a citizen of Virginia.

8 6. The Complaint also names as defendants Robert J. Jackson and Amy E. Starrett.
9 Jackson and Starrett are citizens of California. However, their citizenship should be disregarded
10 for purposes of determining jurisdiction under 28 U.S.C. §1332 and 28 U.S.C. §1441(b) because
11 their joinder is a “sham” or “fraudulent joinder.” The Complaint does not have a single factual or
12 legal allegation against either Jackson and Starrett, who are merely the attorneys of record on the
13 eviction action pending against Plaintiff in Placer County Superior, *Deutsche Bank National Trust*
14 *Co. v. Macklin*, Case No. M-CV-45238. With no cause of action stated against Jackson and
15 Starrett and their statements as attorneys of record protected by the litigation privilege under
16 California law (*see Kolar v. Donahue, McIntosh & Hammerton*, 145 Cal.App.4th 1532 (2006)
17 [litigation privilege shields attorneys from liability for virtually all torts except malicious
18 prosecution]), their joinder is clearly a “sham” and they should be disregarded for purposes of
19 assessing diversity jurisdiction. *See McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th
20 Cir. 1987) [“If a plaintiff fails to state a cause of action against a resident defendant, and the
21 failure is obvious according to the settled rules of the state, the joinder of the resident defendant is
22 fraudulent.”].

23 7. Defendant Linda Feller is unknown to any of Defendants; she is not and has never
24 been an employee Select Portfolio Servicing, Inc, a Utah Corporation with its principal place of
25 business in Salt Lake City, Utah. The same “sham” or “fraudulent joinder” analysis applies to
26 Linda Fuller, as well: the Complaint has no factual allegations against her and no causes of action
27 are directed toward her.
28

1 8. The amount in controversy exceeds \$75,000. "In actions seeking declaratory or
2 injunctive relief, it is well established that the amount in controversy is measured by the value of
3 the object of the litigation." *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333,
4 347 (1977). "[T]he value of the thing sought to be accomplished by the action may relate to
5 either or any party to the action." *McCauley v. Ford Motor Co.*, 264 F.3d 952, 958 (9th Cir. 2001)
6 (citing *Ridder Bros. Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944)).


7 9. To the extent intelligible, Plaintiff's Complaint appears to arise out of a judgment
8 of foreclosure regarding his property in Auburn, California. The amount due on Plaintiff's loan
9 for the property is \$643,295.20 as of April 22, 2010, and the amount of the debt at the time of the
10 Trustee sale of the property was \$623,986.20.

11 VENUE AND INTRADISTRICT ASSIGNMENT

12 10. Venue is proper in this district under 28 U.S.C. § 1441(a) because this District
13 Court embraces the place where the action was pending. Assignment to this Division is proper
14 because the Complaint in this action was initially filed in the Superior Court of California, Placer
15 County, which resides within and is encompassed by this Division. See 28 U.S.C. §§ 1441(a),
16 1442(a), and 1446; see also L.R. 3-2(d).

17 Dated: May 3, 2010

CARR, McCLELLAN, INGERSOLL,
THOMPSON & HORN Professional Law Corporation

18
19 By: 

20 Robert A. Bleicher
21 Attorneys for Defendants Matthew
22 Hollingsworth, Robert J. Jackson, Amy E.
23 Starrett, and R.K. Arnold
24
25
26
27
28

EXHIBIT C

EXHIBIT C

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Facsimile: (650) 342-7685

Attorneys for Defendants
Matthew Hollingsworth, Robert J. Jackson, Amy E. Starrett,
and R.K. Arnold

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES L. MACKLIN,

Plaintiff,

v.

MATTHEW HOLLINGSWORTH, ET
AL.,

Defendants.

Case No. 2:10-CV-01097-FCD-KJN

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION FOR FAILURE
TO STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED [Fed. R. Civ.
P., Rule 12(b)(6)]**

Date: June 18, 2010
Time: 10:00 a.m.
Courtroom: 2
Judge: Hon. Frank C. Damrell, Jr.

Defendants Matthew Hollingsworth, Robert J. Jackson, Amy E, Starrett, and R.K. Arnold (“Defendants”) submit the following Memorandum of Points and Authorities in support of their Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, pursuant to Fed. R. Civ. P., Rule 12(b)(6).

I. INTRODUCTION

Plaintiff James Macklin filed a 128 page Complaint in Placer County Superior Court on April 2, 2010, which Defendants timely removed on May 3, 2010. Despite its length, the Complaint, which appears to concern a foreclosure sale of Mr. Macklin’s home, completely lacks any discernable and coherent factual allegations or identifiable causes of action that plausibly suggest a claim against the Defendants. As such, the Complaint fails to meet the pleading

standards of the Federal Rules of Civil Procedure and the requirements of *Ashcroft v. Iqbal*, 556 U.S.____, 129 S.Ct. 1937 (2009). Accordingly, Defendants ask the Court to dismiss the Complaint for failure to state a claim upon which relief can be granted.

II. STATEMENT OF FACTS

The best that Defendants can discern from the Complaint is that Mr. Macklin's property was foreclosed and he is attempting to raise issues with the Deed of Trust, Promissory Note, and the Power of Sale Clause in the Deed of Trust for the property. As to the Defendants, however, the Complaint does not contain a single factual assertion regarding their conduct and how they purportedly engaged in acts that plausibly give rise to a claim for relief against any of them. Instead, nearly every line of the Complaint is argument, periodically infused with the word "fraud," terms such as "barratry" and "champetry," and laced with other wide ranging references to countless statutes, cases, rules, Constitutional provisions, legal theories, ideas, and definitions, none of which are factually connected to Defendants.

III. ARGUMENT

The Supreme Court's guidance in *Iqbal*, coupled with the pleading requirement of Rules 8 and 9 of the Federal Rules of Civil Procedure, require the dismissal of Mr. Macklin's Complaint because it does not—and in fact cannot—state a claim upon which relief can be granted.

Dismissal under Fed. R. Civ. P., Rule 12 (b)(6) is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *Greehling v. Village of Lombard, Ill.*, 58 F.3d 295, 297 (7th Cir. 1995). As a general matter, in resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept as true all well-pleaded factual allegations; and (3) determine whether the plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Despite this general rule, however, a court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Lit.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). Indeed, the district court clearly has the discretion

1 to grant a Rule 12(b)(6) motion without leave to amend where “it is clear that the complaint could
2 not be saved by an amendment.” *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d
3 940, 946 (9th Cir. 2006).

4 Recent decisions by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544
5 (2007) and *Iqbal, supra*, have made it clear that to survive a Rule 12(b)(6) motion,

6 a complaint must contain sufficient factual matter, accepted as true,
7 to “state a claim to relief that is plausible on its face.”...A claim has
8 facial plausibility when the plaintiff pleads factual content that
9 allows the court to draw the reasonable inference that the defendant
is liable for the misconduct alleged....The plausibility standard is
not akin to a “probability requirement,” but asks for more than a
sheer possibility that a defendant has acted unlawfully.

10 *Id.* at 556 U.S.____, 129 S.Ct. 1937, 1949 (citations omitted).

11 The cornerstone of a sufficiently plead complaint, of course, is Fed.R.Civ.P., Rule 8,
12 which requires a plaintiff to “plead a short and plain statement of the elements of his or her claim,
13 identifying the transaction or occurrence giving rise to the claim and the elements of the prima
14 facie case.” *Bautista v. Los Angeles County*, 216 F.3d 837, 840 (9th Cir. 2000). The complaint,
15 therefore, cannot merely allege that a wrong has been committed and then demand relief. Rather,
16 the complaint must give fair notice and state the claim’s elements plainly and succinctly; it must
17 allege at least with a sufficient degree of particularity the overt facts which the defendant engaged
18 in to support the claim. *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984).
19 As the Court held in *Twombly, supra*, at 557, “[w]ithout some factual allegation in the complaint,
20 it is hard to see how a claimant could satisfy the requirement of providing not only “fair notice”
21 of the nature of the claim, but also “grounds” on which the claim rests.”

22 The fundamental deficiencies of Mr. Macklin’s Complaint appear on each of the 128
23 pages of his filing, they are incurable, and they require the dismissal of his Complaint. There is
24 not a single factual statement regarding any of the Defendants and their purported conduct that (a)
25 puts them on fair notice of the nature of the claims Mr. Macklin is making against them and (b)
26 that allows the court to determine whether, drawing on “its judicial experience and common
27 sense” (*Iqbal, supra*, 556 U.S.____, 129 S.Ct. at 1949-1950), he has stated a plausible claim for
28 relief. Instead, Defendants and the court are faced with 128 pages of disconnected legal citations,

1 irrelevant doctrines, ruminations, speculations, analysis and argument, all loosely connected to
2 the apparent foreclosure of his home and completely disconnected from the Defendants. Even
3 under pre-*Iqbal/Twombly* standards, plaintiff's Complaint lacks any cognizable legal theory
4 sufficiently supported by alleged facts involving the Defendants, and it is therefore totally
5 deficient. With the heightened pleading requirements now mandated by the Supreme Court, Mr.
6 Macklin's Complaint irretrievably fails to state a claim upon which relief can be granted.

7 Mr. Macklin's sprinkling of the word "fraud" in the Complaint does not cure its elemental
8 deficiency. Allegations of fraud must meet the heightened standards of Fed. R. Civ. P., Rule 9(b),
9 which requires Mr. Macklin to state with particularity the circumstances that constitute the fraud.
10 *In Re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-1548 (9th Cir. 1994 (en banc)
11 *superseded by statute on other grounds as stated in Marksman Partners, L.P. v. Chantal Pharm.*
12 *Corp.*, 927 F.Supp. 1297 (C.D.Cal. 1996). The Complaint merely inveighs "fraud" or its
13 synonyms and derivations without any semblance of the supporting factual particularity required
14 by Rule 9(b). Accordingly, to the extent the Complaint seeks to allege "fraud," the factual
15 deficiency of his Complaint supports dismissal on that basis, as well.

16 Although Mr. Macklin is a pro se litigant, he is not exempted from the pleading
17 requirements mandated by the Federal Rules of Civil Procedure and the Supreme Court. As the
18 Court of Appeals stated, "[t]he hazards which beset a layman when he seeks to represent himself
19 are obvious. He who proceeds pro se with full knowledge and understanding of the risks does so
20 with no greater rights than a litigant represented by a lawyer, and the trial court is under no
21 obligation to become an "advocate" for or to assist and guide the pro se layman through the trial
22 thicket." *Jacobsen v. Filler*, 709 F.2d 1362, 1364 n.5 (9th Cir. 1986). Mr. Macklin's Complaint
23 lacks specific allegations regarding any of the Defendants and it fails to give the Defendants fair
24 notice of his claims in a plain and succinct manner. Defendants' motion to dismiss should
25 therefore be granted.

26 ///

27 ///

28 ///

1 IV. CONCLUSION

2 For the reasons set forth above, Defendants request that the court grant their Motion to
3 Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

4 Dated: May 7, 2010

CARR, McCLELLAN, INGERSOLL,
THOMPSON & HORN
Professional Law Corporation

7 By: /s/ Robert Bleicher

8 Robert A. Bleicher
9 Attorneys for Defendants
10 Matthew Hollingsworth, Robert J. Jackson,
Amy E. Starrett, and R.K. Arnold

EXHIBIT D

EXHIBIT D

James L. Macklin, pro-se

10040 Wise Rd.,
Auburn,
California,
95603.

FILED

JUN - 4 2010

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

James L. Macklin, pro-se

Plaintiff,

vs.

**SELECT PORTFOLIO SERVICING,
INC.,** represented by the
C.E.O Mathew Hollingsworth,
and/or his successor, in his
official capacity

**MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,**
represented by R.K. Arnold
and/or his successor, in his
official capacity

**DEUTSCHE BANK NATIONAL TRUST
CO., AS INDENTURE TRUSTEE, OR
ITS' PREDECESSORS OR AGENTS,**

) Case No.: 2:10-cv-1097 Kgm

)

)

)

)

)

) AMENDED COMPLAINT FOR
) TEMPORARY RESTRAINING
) ORDER TO ESTOP THE
) DEFENDANTS FROM SELLING,
) TRANSFERRING, FORECLOSING

AND/OR OTHERWISE TAKING
THE PLAINTIFF'S REAL
PROPERTY,

UNLAWFUL OR FRAUDULENT
BUSINESS ACT OR PRACTICE,

NEGLIGENT INFLECTION OF
EMOTIONAL DISTRESS,

VIOLATION OF DUE PROCESS,
FRAUD BY CONCEALMENT,
BREACH OF CONTRACT,

BREACH OF FIDUCIARY DUTY

1 represented by Robert J.
2 Jackson, Amy E. Starret, and/or
3 his successor, in his official
4 capacity

5
6
7
8 **AND DOES (investors,**
9 **indispensable parties)**

10
11 Defendants.
12
13

14
15 James L. Mackiln, the Plaintiff herein, residing at 10040 Wise
16 Rd., Auburn, California, 95603 in his complaint against Select
17 Portfolio Servicing, Inc., Deutsche Bank National Trust Co. as
18 Indenture Trustee for the Beneficial Holders of Mortgage Loan
19 Trust 2006-2 Asset Backed Notes, and Mortgage Electronic
20 Registration Systems, Inc., alleges the following upon
21 information and belief:
22

23 **DEFENDANTS**
24

25 The Loan Servicer, Select Portfolio Servicing, Inc., is a
26 registered Corp. within the State of California and has
27 represented themselves as a debt collector with right, title
28 and interest, but is merely a Fictitious Payee. Matthew

1 Hollingsworth is the C.E.O of Select Portfolio Servicing, Inc.
2 At all times mentioned herein, Select Portfolio Servicing,
3 Inc. is doing business within the statutory boundaries of the
4 State of California.

5
6 Accredited Home Lenders, Inc. (not named herein) has filed for
7 bankruptcy in April, 2009 and is the party named as
8 Beneficiary in the Deed of Trust. They have nominated Mortgage
9 Electronic Registration Systems, Inc. (MERS) solely as a
10 "nominee beneficiary" in the said Deed. Therefore, in all of
11 the subsequent assignments made by MERS, the assignee can be
12 conferred with only the status as a "Nominee" and have no
13 beneficial interest to the deed. **See: In re Weisband (Ariz.);**
14 **Mtg. Elec. Reg. Sys., Inc. v. Neb. Dept. of Banking and**
15 **Finance, 704 N.W. 2d 784, 786-87(Neb, 2005) (MERS represented**
16 **that it "only holds legal title to members' mortgages in a**
17 **nominee capacity and is contractually prohibited from**
18 **exercising any rights with respect to the mortgages.."; In re**
19 **Sheridan, 2009 WL 631355, *4(Bankr. D. Idaho 2009); In re**
20 **Mitchell, 2009 WL 1044368, *3-4(Bankr. D. Nev. 2009); In re**
21 **Jacobson, 402 B.R. 359, 367 (Bankr. W.D. Wash. 2009).**

22
23 At all times mentioned herein, Accredited Home Lenders, Inc.
24 was conducting business within the statutory boundaries of the
25 State of California.

26
27 At all times mentioned herein, Mortgage Electronic
28 Registration Systems, Inc. is carrying out its' business

1 within the statutory boundaries of the State of California.
2 However, MERS, Inc. is not, and has not been registered with
3 the California Dept. of Corporations, since 2004 and is in
4 violation of many state laws, including, but not limited to:
5 **Cal. Revenue and Taxation Code §§ 23304, 23305(A). RULE OF**
6 **LAW: During suspension, a Corporation is, in fact, "shorn of**
7 **all rights, save those expressly reserved by the statutes."**
8 **(Ransome Crummey Co. v. Superior Court, (1922)188 Cal. 393,**
9 **397.) referring to Cal. Bank & Corp. Franchise Act § 32).** I
10 contend that among the rights lost by a suspended Corporation
11 are the rights to conduct business or pursue legal matters in
12 a Court of Law or non-judicially. (See appeal of **Al Tirpa &**
13 **Assoc. 97-SBE-007, Feb 26, 1997).** Revenue and Taxation Code
14 section 25962.1 makes it a crime for any person to purport to
15 exercise the powers of a Corporation which has been suspended
16 pursuant to Revenue & Taxation Code section 23301.

17
18 Indeed, in **UNITED STATES v. STANDARD BEAUTY SUPPLY STORES,**
19 **INC.**, No. 75-2258, 9th cir., 561 F2d 774; 1977 US App. Lexis
20 11446 (1977) the Court reasoned: "...to back up the
21 suspension, the California Legislature also provided that any
22 contract made in violation of 23301 was voidable at the
23 instance of other parties to the contract, see **Cal. Rev. & Tax**
24 **Code 23304** (West 1970), and that any person purporting to
25 exercise the Corporate powers, rights and privileges would be
26 subject to criminal penalties and fines, see **Id. §**
27 **25962.1...**".
28

1 Deutsche Bank National Trust Co. is the 'Indenture Trustee' on
2 behalf of the Holders of the Notes of Accredited Home Lenders
3 Inc. and was assigned limited interest by MERS. Robert
4 J. Jackson and Amy E. Starrett, who are attorneys of record for
5 non judicial foreclosure, are acting as Agents for Deutsche
6 Bank National Trust Co. At all times mentioned herein,
7 Deutsche Bank National Trust is doing business within the
8 statutory boundaries of the State of California.

9
10 Wells Fargo Bank Mortgage Div. (not yet named herein) is the
11 broker behind the loan transaction. At all times mentioned
12 herein, Wells Fargo is doing business within the statutory
13 boundaries of the State of California.

14
15 The Plaintiff is not aware of the true names and capacities of
16 the Investors/Indispensible parties (Defendants), sued as **DOES**
17 and, therefore, sues these Defendants by such fictitious
18 names. Each of these fictitiously named Defendants is
19 responsible in some manner for the activities alleged in this
20 Complaint. Plaintiff requests leave of this Court to amend and
21 identify the parties for inclusion in this matter at a later
22 date.

23
24 Any allegation on any corporate or other business entity in the
25 complaint would mean that the said defendant did the acts
26 alleged through its officers, directors, employees, agents
27 and/or representatives while they were acting within their
28 actual or ostensible scope of authority.

JURISDICTION AND VENUE

This Court assumes original jurisdiction in the instant matter under 28 U.S.C. 1332 which provides that

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between - (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Thus in spite of the fact that the Plaintiff is a citizen of California, while the Defendant corporate entities are all located at different States; since the value of the subject matter in question is \$659,000.00, as well as the amount mentioned in the Note is the same, the matter in controversy thus exceeds the sum or value of \$75,000, exclusive of interest and costs, thereby conferring jurisdiction to this Court.

As claimed in the 'Notice of removal of the action,' of the Defendants, the Defendants Robert J. Jackson, and Amy E. Starret who are attorneys on record, on the eviction action pending against the Plaintiff in the Placer County Superior, [Deutsche Bank National Trust Co. v. Macklin [Case No. M-CV-

1 45238]], cannot seek protection by any 'litigation privilege'
2 under California law, since "California Civil Code section 47,
3 subdivision 2 confers an absolute privilege, it attaches only
4 to statements or publications, but not actions of the person
5 invoking the privilege." (**Westlake Community Hospital v.**
6 **Superior Court**, (1976) 17 Cal.3d 465, 482, 131 Cal.Rptr. 90,
7 **551 P.2d 410**) Here the attorneys of record (Defendants) have
8 colluded with the other Defendants in committing the
9 fraudulent act of Wrongful Foreclosure, unlawful conversion,
10 and negligent infliction of emotional distress, thereby giving
11 way to a genuine cause of action against them in this matter.
12 In addition to this, the Attorneys are acting as agents of
13 Deutsche Bank National Trust, as Indenture Trustee and
14 therefore are in concert with Defendants knowingly, willfully
15 and intentionally, having the legal knowledge of the herein
16 stated violations of law.

17 18 **STATEMENT OF FACTS**

19
20 The Plaintiff had availed a "loan" from Accredited Home
21 Lenders, Inc. based on a Deed of Trust. The real property that
22 was kept as security for the loan transaction is his primary
23 dwelling. Accredited Home Lenders, Inc. (Beneficiary)
24 incorporated Mortgage Electronic Registration Systems, Inc.
25 (MERS) as the "nominee beneficiary" in the Deed. In accordance
26 with this, a Note was issued by the Plaintiff valued at
27 \$659,000 for the benefit of the alleged "Lender", Accredited
28 Home Lenders. However, Plaintiff was in contract to receive a

1 loan from the purported "Lender" and became aware that the
2 Lender never loaned him anything, rather, the Lender **exchanged**
3 Plaintiffs' Note for a check which was provided by a third
4 party warehouse lender at a **discount** to Lender (undisclosed to
5 borrower), thus, changing the substance of the terms of the
6 contract. The Lender subsequently received a "spread" (un-
7 disclosed) of the discount amount and the actual amount
8 purported in the contract of approximately 2.5% of the value
9 of the loan. Since the Lender never risked any of its' own
10 assets, it could never be harmed and, therefore, did not show
11 equal or valuable consideration in the transaction. Plaintiff
12 shall evidence these facts at trial and possesses the actual
13 Sale & Servicing Agreement, Trust Indenture, and all
14 subsequent accounting from the original transaction inclusive
15 of the securitization chain of accounting.

16
17 In the original loan application, the Plaintiff's income was
18 grossly over-stated by the Broker, Wells Fargo Bank Mortgage.
19 They also placed false information on his period of service in
20 the current job, showing it as 7 years, while it was only 2
21 years and a total of 10.5 years experience in the industry,
22 while it was only 4 years. And Defendants relied on a
23 statement by co-Defendants that Plaintiff lived in the home
24 for more than five (5) years when plaintiff had only lived
25 there for less than a year, this was done to facilitate a
26 "seasoned" residence and further evidences the willing nature
27 of fraudulent practices employed by Defendants with full
28 knowledge and intent. They had knowingly lied on this loan

1 application to qualify the Plaintiff for the said loan. The
2 lender, and all subsequent parties to the transaction, in turn
3 relied heavily upon this information without verifying it.
4

5 The Deed of Trust was signed on April 19th 2006 (though dated
6 as April 14th, 2006), while the Note was signed by the
7 Plaintiff on April 14th, 2006 itself. The Deed was filed for
8 public record at the Placer County Recorder's Office.
9

10 The re-payment of the alleged debt commenced in May, 2006, and
11 continued until August, 2008 when Plaintiff made a claim of
12 genuine doubt regarding the 'true identity' of his creditor as
13 well as disputing the authenticity of his signature in the
14 crucial loan related documents. Though he tried to bring to
15 the attention of the Defendants (documented through an
16 administrative record kept by Plaintiff) the fraudulent
17 information in the loan documents, they blatantly ignored all
18 of his assertions. Plaintiff rescinded his signature pursuant
19 to the remedies within TILA well within the time allowed by
20 statute. Defendants did not answer timely, and when they did,
21 it was without lawful authority and specifically did not
22 qualify as a lawful response, never having followed it's
23 responsibilities under a qualified rescission. **Reg. Z §§**
24 **226.15(a)(2), 226.23(a)(2), Official Staff Commentary §**
25 **226.23(a)(2)-1 and 15 U.S.C. § 1635(b) and other applicable**
26 **law contained in the Federal Truth In Lending Act (TILA).**
27 **Service of the Notice of Rescission was done in accordance**
28 **with the above named laws by Certified Mail with Return**

1 **Receipt of proof of Delivery to the Defendants and is proof of**
2 **Notification pursuant to the Official Staff Commentary,**
3 **226.2(a)(22)-2. See In re Moore, 117 B.R. 135 (Bankr. E.D. Pa.**
4 **1990). The Statute and Regulation specify, By Rule Of Law,**
5 **that the security interest, promissory note or Lien arising by**
6 **operation of law on the property becomes automatically void.**

7
8 Mortgage Electronic Registration System Inc. (MERS, who is the
9 "nominee beneficiary" in the Deed), later made a restricted
10 assignment of the Deed to Deutsche Bank National Trust Co. by
11 making them the Indenture Trustee in the Deed of Trust.
12 However, the assignment came three months **after** Deutsche Bank
13 had made a Substitution of Trustee, **without authority**, to
14 Quality Loan Services, Inc. in order to implement the wrongful
15 foreclosure action. This Trustee who had, in fact, only the
16 status as that of a "nominee beneficiary", without any
17 adequate *locus-standi* against the Plaintiff in the said loan
18 transaction, initiated fraudulent sales and foreclosure
19 proceedings against him through Select Portfolio Services,
20 Inc. (Debt Collectors), who acted as their agents.

21
22 This action is thus based on the Defendant's numerous acts of
23 fraud upon the Plaintiff, the Court and upon the People of
24 California, inclusive of any and all Trustee sales, judicial
25 or non-judicial proceedings, as well as the Defendant's
26 purposeful fraud in attempting to appear as a CREDITOR to the
27 Court, while fully aware of the fact that none of the
28

1 Defendants are the CREDITOR, and, therefore, NOT THE REAL
2 PARTY IN INTEREST in the wrongful foreclosure matter.

3
4 The Defendants have clearly failed to appear before this
5 Honorable Court with 'clean hands,' while the Plaintiff is
6 genuinely seeking justice under Federal Law and California
7 Code.

8
9 **CAUSES OF ACTION**

10
11 Plaintiff respectfully submits as follows:

12
13 **I. THE NON-JUDICIAL FORECLOSURE INITIATED BY THE**
14 **DEFENDANTS IS VOID AND ILLEGAL**

15
16 **1. The Defendants lack Authority and standing to conduct the**
17 **Trustee Sale and non-judicial foreclosure**

18
19 It is hereby submitted before this Honorable Court that the
20 Defendants herein fail to possess the required authority and
21 standing to initiate the Trustee sale and foreclosure
22 proceedings against the Plaintiff, as they are neither the
23 'creditors' nor the 'real party in interest' in the instant
24 case, thereby making the Trustee sale and non-judicial
25 foreclosure initiated by them against the Plaintiff's real
26 property void.

1 Since, in the instant case, the loan transaction was based on
2 a Deed of Trust, the 'power of sale' under the alleged Deed
3 has been conferred on the alleged Trustee (Deutsche Bank
4 National Trust). For the Trustee to conduct the Trustee sale
5 and foreclosure, they are required to be the 'real party in
6 interest.'

7
8 The 'real party in interest' is defined as a person "who has
9 the right to sue under the substantive law. It is the person
10 who owns or holds title to the claim or property involved, as
11 opposed to others who may be interested or benefit by the
12 litigation." (*O'Flaherty v. Belgum* (2004), 115 Cal.App.4th
13 1044)

14
15 As per the Deed of Trust, Accredited Home Lenders, Inc.,
16 (lender) named Mortgage Electronic Registration Systems Inc.
17 (MERS) as the "nominee beneficiary". And there was a
18 separation of the Deed of Trust and the Promissory note at the
19 time of the transaction, whereby MERS was made the holder of
20 the Deed of Trust.

21
22 "The practical effect of splitting the deed of trust from the
23 Note is to make it impossible for the holder of the Note to
24 foreclose, unless the holder of the deed of trust is the agent
25 of the holder of the Note. Without the agency relationship,
26 the person holding only the Note lacks the power to foreclose
27 in the event of default. The person holding only the deed of
28 trust will never experience default because only the holder of

1 the note is entitled to payment of the underlying obligation."
2 **Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619, 623**
3 **(Mo. App. 2009)** From the facts available at hand, it cannot be
4 inferred that there existed such an agency relationship
5 between MERS and the Holder of the Note, as there doesn't
6 exist any Agency Agreement.

7
8 **US Bankruptcy Court, Eastern Dist. Of California: Honorable**
9 **Ronald H. Sargis, Sacramento, Ca., May 20, 2010, Case No.10-**
10 **21656-E-11 Ricky Walker; To wit: "Under California law, to**
11 **perfect the transfer of mortgage paper as collateral the owner**
12 **should physically transfer the Note to the transferee. Bear v.**
13 **Golden Plan of California, Inc., 829 F.2d 705, 709(9th**
14 **Cir.1986). Without physical transfer, the sale of the Note**
15 **could be invalid as a fraudulent conveyance, Cal. Civil Code**
16 **3440, or as unperfected Cal. Comm. Code 9313-9314, see Roger**
17 **Bernhardt, California mortgage and Deed of Trusts, and**
18 **foreclosure litigation 1.26 (4th Ed. 2009)". Since it is well**
19 **settled law that the Note and the Deed are inseparable, any**
20 **and all assignees of the Deed, as an incident to the Note, are**
21 **invalid on their face and constitute evidence of the fraud**
22 **perpetrated upon Plaintiff, the People of California and this**
23 **Court.**

24
25 MERS later transferred their limited interest under the Deed
26 of Trust to Deutsche Bank, making them the "**Nominee**" by way of
27 an assignment. There is no evidence to show that the Note was
28 also transferred to MERS along with the Deed, nor can there

1 possibly be due to the sale and subsequent securitization of
2 the Note. And they are found to have miserably failed in
3 presenting the 'Genuine Original Promissory Note' before the
4 officers acting in the non-judicial foreclosure, which is
5 suggestive of the fact that they are not in possession of the
6 Genuine Original Promissory Note.

7 It is a settled position in law that "the Deed of Trust is a
8 mere incident of the debt that it secures and an assignment of
9 the debt carries with it the security instrument. Therefore, a
10 Deed of Trust is inseparable from the debt and always abides
11 with the debt. It has no market or ascertainable value apart
12 from the obligation it secures. A Deed of Trust has no
13 assignable quality independent of the debt, it may not be
14 assigned or transferred apart from the debt, and an attempt to
15 assign the Deed Of Trust without a transfer of the debt is
16 without effect." (*La Salle Bank Nat. Ass'n v. Lamy*, 2006 WL
17 **2251721**, at *2 (N.Y. Sup. 2006)) (unpublished opinion)

18
19 MERS, not being the owner of the Note, would be entitled to
20 transfer only whatever interest that they had in the Deed of
21 Trust, and nothing more. This is quite evident from the legal
22 maxim- "*Nemo plus juris transferre ad alium potest quam ipse*
23 *habet*" meaning 'no one can transfer a greater right than he
24 himself has.' It was observed in the recent case of *Landmark*
25 *Nat. Bank v. Kesler*, 216 P.3d 158 (Kan. Sup. Ct., 2009) that
26 "any attempt to transfer the beneficial interest of a trust
27 deed without ownership of the note is void" and is consistent
28 with California law. Thus, by way of the assignment, there

1 cannot be a transfer of the note or the beneficial interest in
2 the Deed. Deutsche Bank merely "**steps into the shoes**" of the
3 "nominee beneficiary" with no right, title, or interest
4 whatsoever.

5
6 Select Portfolio Servicing, Inc., who acted as the debt
7 collector in violation of FDCPA § 1692 et. seq., and in the
8 case herein, performed their activities as an agent and in the
9 limited capacity of "Attorney-in-Fact" for the Trustee
10 (Deutsche Bank). Since "an agent has no implied authority to
11 do what the principal is not empowered to do." (**Amalgamated
12 Clothing W'K'Rs v. Kiser, 174 Va. 229 (Va, 1939)**) it can be
13 inferred that the Debt collector (agent) cannot be deemed to
14 be a 'real party in interest' which the alleged principal has
15 failed in also. Thus, the Trustee sale and foreclosure
16 proceedings initiated by the Defendants are void and without
17 authority.

18 19 **2. The Defendants lack standing as a Holder in Due Course**

20
21 UCC 3-302(3) defines a "holder in due course": (a) Subject to
22 subsection (c) and Section 3-106(d), "holder in due course"
23 means the holder of an instrument if:

24 (2) the holder took the instrument (i) for value, (ii) in good
25 faith, (iii) without notice that the instrument is overdue or
26 has been dishonored or that there is an uncured default with
27 respect to payment of another instrument issued as part of the
28 same series, (iv) without notice that the instrument contains

1 an unauthorized signature or has been altered, (v) without
2 notice of any claim to the instrument described in Section 3-
3 306, and (vi) without notice that any party has a defense or
4 claim in recoupment described in Section 3-305(a).

5 (c) Except to the extent a transferor or predecessor in
6 interest has rights as a holder in due course, a person does
7 not acquire rights of a holder in due course of an instrument
8 taken (i) by legal process or by purchase in an execution,
9 bankruptcy, or creditor's sale or similar proceeding, (ii) by
10 purchase as part of a bulk transaction not in ordinary course
11 of business of the transferor, or (iii) as the successor in
12 interest to an estate or other organization.

13
14 The Defendants in the instant case have not been able to
15 produce the 'genuine original promissory note' before the non-
16 judicial officers at the foreclosure proceedings, which would
17 be the only evidence to show that they are the 'real party in
18 interest'. The Plaintiff hereby contends that even if the
19 Defendants are found to be in possession of the note, they
20 cannot fall under the definition of a 'holder in due course'
21 as provided under the UCC 3-302(3).

22
23 This is because of the fact that the Defendant herein would
24 have received a copy of the Note after the Note was determined
25 to be in default. The Defendant was fully informed that the
26 Note and/or the Mortgage was disputed, delinquent and was in
27 dishonor before he became a holder of the copy of the Note.
28 Thus even if the Defendant did prove the possession of the

1 Genuine Original Promissory Note, the Defendant's claims are
2 still invalid as he would not amount to a "Holder in due
3 Course" as provided by the Uniform Commercial Code § 3-302.
4

5 **3. Violation of Fair Debt Collection Practices Act**

6

7 The Plaintiff hereby submits before this Court that Select
8 Portfolio Servicing, Inc. (debt collector) has violated the
9 Fair Debt Collection Practices Act, 15 U.S.C. § 1692g(b) by
10 failing to comply with the procedural requirements under the
11 Act.
12

13 15 U.S.C. Section 1692 (g) (b) provides that "If the consumer
14 notifies the debt collector in writing within the thirty-day
15 period **(or within three years of discovering TILA violations)**
16 **described in subsection (a) of this section** that the debt, or
17 any portion thereof, is disputed, or that the consumer
18 requests the name and address of the original creditor, the
19 debt collector shall cease collection of the debt, or any
20 disputed portion thereof, until the debt collector obtains
21 verification of the debt or a copy of a judgment, or the name
22 and address of the original creditor, and a copy of such
23 verification or judgment, or name and address of the original
24 creditor, is mailed to the consumer by the debt collector."
25

26 The Plaintiff in this case contends that the reason for his
27 default in repayment of the loan amount due, was his genuine
28 doubt regarding the true amount owed and the underlying

1 applications used, being filled with false information, and
2 the true identity of the creditor. He accordingly raised a
3 formal dispute as to the authenticity of his signatures and
4 the actual accounting of the transaction in its' entirety. But
5 request for an explanation was fully ignored and neglected by
6 the Defendants, bringing about a violation of 15 U.S.C.
7 Section 1692 (g)(b). Factual evidence of the lawful requests
8 and subsequent failures at law by Defendants shall be provided
9 by Plaintiff at trial.

10
11 **II. BREACH OF FIDUCIARY DUTY AND VIOLATION OF THE TRUTH IN**
12 **LENDING ACT (Regulation Z)**

13
14 **1. Disclosure Requirements**

15
16 "The elements of a cause of action for breach of fiduciary
17 duty are: 1) the existence of a fiduciary duty; 2) a breach of
18 the fiduciary duty; and 3) resulting damage." (*Pellegrini v.*
19 *Weiss*, 165 Cal. App.4th 515, 524, 81 Cal.Rptr.3d 387 (2008))

20
21 Under California law, "A mortgage broker owes a fiduciary duty
22 to their client." (Cal. Civ.Code § 2079.24; *Zimmer v. Nawabi*,
23 *566 F.Supp.2d 1025 (E.D.Cal.2008)*) This duty obligates the
24 brokers to "make a full and accurate disclosure of the terms
25 of a loan to borrowers and to act always in the utmost good
26 faith toward them." (*Wyatt*, 24 Cal.3d at 782, 157 Cal.Rptr.
27 *392*, 598 P.2d 45 (citing *Rattray v. Scudder*, 28 Cal.2d 214,
28 *223*, 169 P.2d 371 (1946)).

1
2 § 226.17 of the Truth in Lending Act mandates the 'General
3 Disclosure Requirements', whereby the creditor is duty bound
4 to make the disclosures clearly and conspicuously in writing,
5 in a form that the consumer may keep. Under sub-section (c)
6 the disclosures thus made shall reflect the terms of the legal
7 obligation between the parties. And if any information
8 necessary for an accurate disclosure is unknown to the
9 creditor, the creditor shall make the disclosure based on the
10 best information reasonably available at the time the
11 disclosure is provided to the consumer, and shall state
12 clearly that the disclosure is an estimate(\$ 226.17 (2) (i)).
13 In addition to this, § 226.18 details the 'Content of
14 disclosures.'

15 In the instant matter the Defendants clearly had the fiduciary
16 duty under the Deed of Trust, to protect the Plaintiff's
17 interest, while granting the loan. By showing an enhanced
18 amount as the Plaintiff's income, for the purpose of obtaining
19 the loan, the broker failed to perform their duty towards the
20 Plaintiff, by breaching the disclosure requirements under the
21 Truth in Lending Act. While the Lender also owed a contractual
22 duty to the Plaintiff to verify the information received from
23 the broker through the Plaintiff's tax returns, bank account
24 statements, and other financial documents which were provided
25 as a "full document loan" by the Plaintiff. This is because
26 TILA mandates the creditors provide their borrowers with clear
27 and accurate disclosures of borrowers' rights, finance
28

1 charges, the amount financed, and the annual percentage rate.
2 (15 U.S.C. §§ 1632, 1635, 1638)

3
4 The factual information available are indicative of the fact
5 that the Broker had intentionally marked his income in the
6 loan application document as \$29,000 per month while his tax
7 returns clearly indicated an income of approximately \$8,000
8 per month. And on the second mortgage application, they showed
9 his income as \$23,000 per month which was still almost triple
10 his actual income. The loan document indicated a total of
11 \$65,000 in cash in his bank account, which was not ever there,
12 and the home was valued at only \$615,000 in the second
13 (subordinate financing) loan, while being valued at
14 \$685,000.00 for the first loan. This represents false and
15 misleading information provided by the lender/broker to be
16 relied upon by possible investors and being transmitted across
17 state lines on U.S. Government forms. They also placed more
18 false information pertaining to his vocation, where his job
19 experience in the current job was marked as 7 years instead of
20 2 years (actual) and a total of 10.5 years in the industry,
21 while it was only 4 years. Defendants profited by these
22 actions, which were self-serving and were done knowingly and
23 intentionally in order to reap profits for all participants in
24 the loan/securitization scheme and was perpetrated upon many
25 other California residents.

26
27 The Defendants, again, with the *malafide* intention of
28 converting the Plaintiff's real property from its' true owner

1 to the Defendants, introduced "legalese" into the Deed, which
2 the Plaintiff was unable to understand in its real sense. In
3 addition to this they fraudulently damaged the 'genuine
4 original promissory note' issued by the Plaintiff to
5 securitize the Note. The Defendants, through these wrongful
6 means, thus could initiate the Trustee sale and foreclosure
7 proceeding with the support of the erroneous information
8 provided by the broker/lender and further profit by the
9 "Credit Enhancements" provided for by the mortgage loan trust
10 investments in the form of default swaps, loan loss insurance,
11 and various other investments designed for the specific
12 purpose of profiting from the assured default of thousands of
13 fraudulent loans. All of this was by design and the Plaintiff
14 has the supporting securitization chain of documents which
15 shall be produced at trial.

16 17 **2. Right to Rescission**

18
19 The Truth in lending Act, § 226.23 (a) grants the Consumers
20 with the right to rescind the loan under certain situations.
21 15 U.S.C. § 1635(a) provides that in the case of a consumer
22 credit transaction in which the creditor acquires a security
23 interest in property to be used as the principal residence of
24 the obligor, the obligor "shall have the right to rescind the
25 transaction until midnight of the third business day following
26 the consummation of the transaction or the delivery of the
27 information or rescission forms. "An obligor who exercises
28 their right to rescind" is not liable for any finance or other

1 charge, and any security interest given by the obligor,
2 including any such interest arising by operation of law,
3 becomes void upon rescission." (Id. at § 1635(b)) This right
4 was never disclosed to Plaintiff in the timely and lawful
5 manner in which the law provides.

6
7 The only requirement to be satisfied, for the obligor to
8 exercise the right to rescind, is that he must "notify the
9 creditor of the rescission by mail, telegram, or other means
10 of written communication." (12 C.F.R. § 226.23(a)(2)) And
11 within 20 days of receiving notice of rescission, "the
12 creditor shall return to the obligor any money or property
13 given as earnest money, down payment, or otherwise, and shall
14 take any action necessary or appropriate to reflect the
15 termination of any security interest created under the
16 transaction."

17
18 Plaintiff herein clearly asserts that he sent the Defendants a
19 Qualified Written Request/Notice of Loan Rescission, received
20 by Defendants via certified mail on Feb. 12, 2009, while the
21 Defendants did not timely respond to this. This is a
22 substantive breach of the Defendants' duty to act under TILA.
23 **See: TILA, Reg. Z, 12 CFR 226.23:...** "the security agreement
24 **signed with a lender can be rescinded if they have not**
25 **provided the proper disclosures. Although home mortgages are**
26 **exempt from some rescissions, this option becomes available if**
27 **they begin foreclosure and they stated an incorrect amount of**
28 **debt."** Plaintiff has factual evidence in his possession that

1 Defendants did receive third party payments into the Trust
2 payment account through the mechanism of TARP/TARF funds,
3 credit default swaps, credit enhancements through ancillary
4 investments by the Trust, over-collateralization, loan loss
5 insurance, and a variety of other payments. Defendants were
6 aware of these payments and their effect upon amounts
7 allegedly owed under the Note, and have purposely secreted
8 these amounts so as to protect the interests of the Indenture
9 Trustee, Swap Provider, Note insurer, and Owner Trustee, all
10 of whom are Beneficial Holders of the underlying trust.
11 Pursuant to the Deed of Trust signed by Plaintiff, there is a
12 specific priority of application of funds received by the
13 Trust which states: 1. Payment of interest on the Note, 2.
14 Payment of Principle on the Note, etc.. Trust administrators
15 have elected to ignore their duties to the Borrower and
16 investor, while taking investment profits, TARP funds, and all
17 other methods of payment for their own unjust enrichment.
18 Plaintiffs' original signature, payments and Note along with
19 investors funds are the source of these profits, without
20 disclosure from the alleged "Creditor".

21
22 **In re Pearl Maxwell, 281 B.R. 101: Full disclosure was not**
23 **given and therefore an unconscionable contract.**
24

25 This can also be conceived as a confession of the Defendant
26 that they are committing fraud, knowing that they are not the
27 'creditor' and that they are not the 'real party in interest'
28 in the instant matter, as "Silence can only be equated with

1 fraud where there is a legal or moral duty to speak or when an
2 inquiry left unanswered would be intentionally misleading."

3 **(United States v. Kis, 658 F.2d, 526 (7th Cir. 1981) Cert**
4 **Denied, 50 U.S. L.W. 2169; S. Ct. March 22, (1982))**

5 Since the Mortgage Loan Trust, AMLT 2006-2, where the Note
6 allegedly is held as trust property, is, in fact, a REMIC
7 Trust, Deutsche Bank is treating the Notes as debt, and
8 therefore cannot possibly be a creditor. And, pursuant to the
9 Trust Indenture, the investors who possess "Book-Entry Notes"
10 with a certificated interest, not right, title, and interest
11 in the underlying Notes, are merely the recipients of the
12 trust profits at a given rate pre-determined long before the
13 loan transaction was ever even contemplated. Thus, the entire
14 accounting of the actual Payment Account of the mortgage loan
15 trust, along with ancillary accounts authorized in trust, must
16 be brought forward to determine the true condition of the
17 alleged debt owed, if any, by Plaintiff.

18
19 **3. Prohibited acts or practices in connection with credit**
20 **secured by a consumer's principal dwelling**

21
22 TILA prohibits certain acts and practices in connection with
23 the credit secured by the consumer's principal dwelling. One
24 such act is the **'misrepresentation of value of consumer's**
25 **dwelling.'** According to § 226.36(1) in connection with a
26 consumer credit transaction secured by a consumer's principal
27 dwelling, no creditor or mortgage broker, and no affiliate of
28 a creditor or mortgage broker shall directly or indirectly

1 coerce, influence, or otherwise encourage an appraiser to
2 misstate or misrepresent the value of such dwelling. And a
3 creditor who knows, at or before loan consummation, of a
4 violation of this shall not extend credit based on such
5 appraisal unless the creditor documents that it has acted with
6 reasonable diligence to determine that the appraisal does not
7 materially misstate or misrepresent the value of such
8 dwelling. The face of the two separate loan applications,
9 filled in by the Broker on behalf of the Lender, evidence a
10 disparity in the amount of \$65,000.00. This is fraud in the
11 inducement, and breach of contract and duty by Defendants. It
12 may also constitute criminal activities by Defendants.

13
14 The Plaintiff has been able to show that the loan was obtained
15 by the broker by intentionally incorporating incorrect
16 information in the loan documents, as it pertains to the value
17 of the consumer's dwelling. Additionally the lender, when
18 granting the loan, negligently relied upon this false and
19 misleading information, and conferred him with a loan, which
20 was not lawful under the statutory regulations. The lender
21 failed to exercise due diligence to determine as to whether
22 there was any misstatement in the loan documents as regards to
23 the value of the dwelling. This has given way to a patent
24 violation of TILA.

25
26 **III. THE ACTS OF THE DEFENDANTS AMOUNT TO FRAUD BY CONCEALMENT**
27
28

1 "Concealment is a species of fraud or deceit." (*Blickman*
2 *Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App.4th
3 858, 868, 76 Cal.Rptr.3d 325 (2008)) The following elements
4 must be proven to establish a fraud by concealment claim: 1)
5 the defendant concealed or suppressed a material fact, 2) the
6 defendant was under a duty to disclose the fact to the
7 plaintiff, 3) the defendant intentionally concealed or
8 suppressed the fact with the intent to defraud the plaintiff,
9 4) the plaintiff was unaware of the fact and would not have
10 acted as he did had he known of the concealed or suppressed
11 fact, and 5) the plaintiff sustained damages as a result of
12 the concealment or suppression of the fact (*Lovejoy v. AT & T*
13 *Corp.*, 92 Cal.App.4th 85, 96, 92 Cal.App.4th 1016F, 111 Cal.
14 *Rptr.2d* 711 (2001))

15
16 From the aforementioned contentions it has been established
17 that there has been an infringement of the disclosure
18 requirements by the Defendants by way of an active concealment
19 of certain material facts. By obtaining sanction for a loan,
20 for a higher amount than what the application deserved, the
21 Defendants have been able to receive a proportionally greater
22 amount of fees, investment profits and bonuses which he
23 otherwise would not have enjoyed. Added to this, the lender,
24 by neglecting to verify the veracity of the loan documents,
25 has permitted the loan without verifying **viability** of future
26 payment. The intention to commit fraud, or knowingly act upon
27 the fraud of another, is quite explicit from this. The
28

1 recipient of the fruits of the fraud is just as culpable as
2 the party executing the fraud.

3
4 The aspect of intentional fraud can further be proved from the
5 Defendant's act of issuing the Plaintiff a check for loan
6 purposes, without utilizing their own assets, exchanging the
7 Plaintiff's Note at a discount, without disclosure of the
8 fact, thereby changing the substance of the terms of the
9 alleged loan. This was fully done by Defendants without the
10 Plaintiff's knowledge and with forethought and malice.

11
12 **IV. THERE HAS BEEN A VIOLATION OF THE PLAINTIFF'S FUNDAMENTAL**
13 **RIGHT UNDER 'DUE PROCESS' DUE TO LACK OF NOTICE**

14
15 In the Deed of Trust between the Plaintiff and the Defendant,
16 the Defendant intentionally concealed the existence of certain
17 hidden clauses, especially the one known as the 'Power of Sale
18 Clause', which grants power to the Defendant to sell
19 Plaintiffs' property without due process. The Plaintiff was
20 not given Notice of this clause, which is now being used by
21 the Defendants to unlawfully confiscate the Plaintiff's real
22 property. This has resulted in a clear-cut violation of the
23 Plaintiff's fundamental right to due process (as guaranteed by
24 the 14th Amendment to the US Constitution and the Constitution
25 of California).

26
27 ***"Procedural due process mandates that an individual be***
28 ***afforded notice and an opportunity for a hearing before he is***

1 deprived of any significant property interest" (*Randone v.*
2 *Appellate Department* (1971) 5 Cal.3d 536, 541, 96 Cal.Rptr.
3 709, 488 P.2d 13) "When notice is a person's due process,
4 which is a mere gesture, it is not due process. The means
5 employed must be such as one desirous of actually informing
6 the [person] who might reasonably adopt to accomplish it."
7 (*Mullane v. Central Hanover Bank & Trust Co.*, (1950) 339 U.S.
8 306) A hidden 'power of sale clause' in a deed would in effect
9 create a cognovit note/ confession of judgment, thereby
10 creating conditions for the violation of the California
11 Constitution.

12
13 In addition to this, the non-judicial foreclosure in
14 California is governed by a comprehensive statutory scheme
15 which provides that "upon default by the trustor, the
16 beneficiary may declare a default and proceed with a non-
17 judicial foreclosure sale. The foreclosure process is
18 commenced by the recording of a notice of default and election
19 to sell by the trustee. After the notice of default is
20 recorded, the trustee must wait three calendar months before
21 proceeding with the sale. After the three-month period has
22 elapsed, a notice of sale must be published, posted and mailed
23 20 days before the sale and recorded 14 days before the sale."
24 (Civ. Code, § 2924 et seq) "To be effective, a copy of the
25 notice of trustee's sale—at least 20 days prior to the sale—
26 must be mailed by registered or certified mail, postage
27 prepaid, to the trustor, sent to his or her last known address
28

1 if different from the address listed on the deed of trust"
2 (Civ. Code, § 2924b, subd. (b)(2))
3

4 It is submitted before this court that the Defendants have
5 intentionally omitted to act in accordance with these
6 provisions. All assignments have been falsely presented to the
7 Placer county Recorders' Office as evidence of right, title
8 and interest, while purporting to Plaintiff that Defendants
9 have "duly perfected" title through the statute. Plaintiff
10 shall evidence to this Court the actual recorded substitution
11 of trustee, Corporate assignment of trustee, and other
12 recorded documents used by Defendants to unlawfully secure
13 Plaintiffs' property without lawful authority. This represents
14 unlawful conversion and theft by Defendants. All recorded
15 documents used by Defendants are without lawful authority and
16 have been altered and falsified to meet their self-serving
17 interests. Plaintiff shall produce these documents at trial.
18

19 **V. THE DEFENDANTS HAVE ENGAGED IN UNLAWFUL, UNFAIR AND**
20 **FRAUDULENT BUSINESS ACTS AND PRACTICES**
21

22 Section 17200 of California Unfair Competition Law creates a
23 cause of action for an 'unlawful, unfair or' fraudulent
24 business act or practice.' Its coverage has been described as
25 "sweeping, embracing anything that can properly be called a
26 business practice and at the same time is forbidden by law."
27 (*Cel-Tech Communs., Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th
28 163, 83 Cal.Rptr.2d 548, 560, 973 P.2d 527 (1999))

1
2 **1. RESPA violation**

3
4 The Plaintiff's claim for unfair business practices can be
5 gathered upon defendants' violation of the Real Estate
6 Settlement Procedures Act, since the Business and Professions
7 Code section 17200 'borrows' violations of other laws and
8 treats them as unlawful business practices independently
9 actionable under section 17200," (*Farmers*, 2 Cal.4th at 383, 6
10 Cal.Rptr.2d 487, 826 P.2d 730; *Monaco v. Bear Stearns*
11 *Residential Mortgage. Corp.*, 554 F.Supp.2d 1034
12 (C.D.Cal.2008))

13
14 Section 2605 (a) of the Real Estate Settlement Procedures Act
15 directs each person who makes a federally related mortgage
16 loan to disclose to each person who applies for the loan, at
17 the time of application for the loan, whether the servicing of
18 the loan may be assigned, sold, or transferred to any other
19 person at any time while the loan is outstanding.

20
21 In the instant case, the entire loan transaction was based on
22 a Deed of Trust wherein the Plaintiff was not made aware of
23 the lender's intention to split the Note and the Deed. MERS
24 was made the "nominee beneficiary" in the deed and was
25 unlawfully conferred with limited interest in the Deed. Since
26 MERS, Inc. has had no registration with the California Dept.
27 of Corporations since 2004, this assignment is void and
28 possibly criminal. The nominee beneficiary then assigned their

1 interests to Deutsche Bank, by appointing them as the
2 'Indenture Trustee.' The Loan servicer herein, i.e. Select
3 Portfolio Servicing Inc., acted as an agent for the Trustee in
4 collecting the debt. The Plaintiff was never informed about
5 these unlawful assignments, either in the Deed of Trust or
6 anytime afterwards.

7
8 This is an unfair and fraudulent business practice that the
9 Defendants have demonstrated.

10
11 **2. Defendants have engaged in predatory lending**

12 "Predatory lending" is a term generally used to characterize
13 a range of abusive and aggressive lending practices, including
14 deception or fraud, charging excessive fees and interest
15 rates, **making loans without regard to a borrower's ability to**
16 **repay**, or refinancing loans repeatedly over a short period of
17 time to incur additional fees without any economic gain to the
18 borrower. (*American Financial Services Association v. City of*
19 *Oakland*, 104 P.3d 813, 34 Cal.4th 1239, 23 Cal.Rptr.3d 453
20 (Cal. 01/31/2005))

21 The Court has given a wide interpretation to the aspect of
22 'predatory lending.' It is hereby respectfully submitted, that
23 this Honorable Court may deem, from the facts stated above and
24 the arguments advanced herein, that this case is one fit and
25 proper to infer that the Defendants' activities would amount
26 to predatory lending and that their fraudulent acts have given
27 them unjust enrichment and have caused great harm and
28 negligent infliction of emotional distress.

1
2 **VI. THE PLAINTIFF HAS SUFFERED INJURY DUE TO THE INTENTIONAL**
3 **INFLICTION OF EMOTIONAL DISTRESS**
4

5 To state a claim for intentional infliction of emotional
6 distress, Plaintiff must allege (1) outrageous conduct by
7 Defendants, (2) Defendants intentionally caused or recklessly
8 disregarded the probability of causing emotional distress, (3)
9 Plaintiff suffered severe or extreme emotional distress, and
10 (4) Defendants' outrageous conduct was the actual and
11 proximate cause of their emotional distress. (***Trerice v. Blue***
12 ***Cross of Cal.***, 209 Cal.App.3d 878, 883, 257 Cal.Rptr. 338
13 **(1989)**)

14
15 Conduct is said to be outrageous if it is "so extreme as to
16 exceed all bounds of that usually tolerated in a civilized
17 society." Id.

18
19 In the instant case, the several acts of the Defendants have
20 jointly inflicted severe emotional distress to the Plaintiff,
21 as a result of which his only dwelling household is itself at
22 stake now. The loan transaction in its entirety turned out to
23 be a sham, whereby the Plaintiff was found to have undergone
24 traumatic events throughout this insidious process. Each of
25 the entities involved in the transaction, having a statutory
26 and legal duty to the Plaintiff, have betrayed him and the
27 law. It is submitted that the aforesaid outrageous conduct of
28

1 the Defendants are beyond the level of tolerance of the
2 Plaintiff and the public at large.

3
4 The Court of Appeals in ***Russell v. Massachusetts Mut. Life***
5 ***Ins. Co.***, 722 F.2d 482 (C.A.9 (Cal.) 1983, stated that the
6 award of compensatory damages shall "remedy the wrong and make
7 the aggrieved individual whole," which meant not merely
8 contractual damages for loss of plan benefits, but relief
9 "that will compensate the injured party for all losses and
10 injuries sustained as a direct and proximate cause of the
11 breach of fiduciary duty," including "damages for mental or
12 emotional distress."

13
14 This Honorable Court may give due considerations to the
15 distress and agony the Plaintiff herein has endured, while
16 adjudicating. Plaintiff has accrued over 4,000 hours of
17 intense study, at his own expense, in order to defend his
18 property. Plaintiff has been injured by Defendants' own
19 knowing and intentional acts.

20
21 **VII. CLAIM FOR INJUNCTIVE RELIEF**

22
23 A temporary restraining order and permanent injunction is
24 absolutely necessary in the present case to speedily
25 effectuate the rights and status of Plaintiff in relation to
26 the Defendants as well as to delineate the authority of each
27 of the Defendants in their actions taken against the
28 Plaintiff. Any delay in granting the Plaintiff's request for a

1 temporary restraining order will result in irreparable injury
2 to the Plaintiff. A temporary restraining order is proper when
3 (a) there is a reasonable likelihood of success (b)
4 irreparable injury (c) balance of convenience which is in
5 favor of the Plaintiff (d) the public interest is favorably
6 impacted.

7
8 An actual controversy does exist between the Plaintiff and the
9 Defendants both individually as well as collectively. If the
10 Defendants continue to usurp the Plaintiff's rights, it would
11 result in a complete deprivation of the Plaintiff's property.
12 Pending the determination of this controversy by this
13 Honorable Court, additional litigation is inevitable. In the
14 absence thereof, the Plaintiff will be forced to proceed in
15 securing his rights, as opposed to the Defendants' meritless
16 action undertaken against the Plaintiff.

17
18 It is here forth submitted that denial of the injunctive
19 relief would cause the Plaintiff immediate, and irreparable
20 injury, as he would lose his only residence if it were
21 foreclosed. It has been held by the Court that "a loss of a
22 preliminary residence is irreparable injury." (**Avila v.**
23 **Stearns Lending Inc., 2008 WL 1378231, at *3 (C.D. Cal. April**
24 **7, 2008)**) Since the property at issue is his primary
25 residence, Plaintiff's claim for legal remedy against the
26 defendants i.e., damages would be inadequate without grant of
27 injunction. Plaintiff asserts that his Amended Complaint
28

1 therefore meets the equitable criteria for stating a cause of
2 action for injunctive relief.

3
4 **PRAYER FOR RELIEF**

5
6 The following are the reliefs sought for in the instant
7 matter:

- 8
- 9 1) Defendant should return the 'Genuine Original Promissory
10 Note' or its proceeds and all the money paid by the
11 Plaintiff to the Defendant, with full disclosure of
12 accounting of such, to the Plaintiff forthwith,
 - 13 2) If the Defendant is not able to return the 'Genuine
14 Original Promissory Note' to the Plaintiff then the
15 Defendant should be deemed to be admitting his unlawful
16 attempt to convert real property without cause and/or
17 right
 - 18 3) Defendant present to the Plaintiff and to this Court an
19 Affidavit stating that he has no right to the real
20 property in question
 - 21 4) Defendant return the DEED and other documents pertaining
22 to ownership of the real property in question to the
23 Plaintiff
 - 24 5) If the Defendant DOES NOT state the claim under penalty
25 of perjury that the Defendant is the Creditor in the
26 instant matter, the Defendants agree to accept the
27 judgment by default in favor of Plaintiff
- 28

1 6) If the Defendant DOES state the claim under penalty of
2 perjury that the Defendant is the Creditor in the instant
3 matter, the Defendants agree to deliver acknowledgement
4 of such forthwith to the S.E.C, the I.R.S. and the State
5 of California and County of Placer for restitution of the
6 various fees and taxes it has avoided through the
7 mechanism of tax exempt status of the mortgage loan trust
8 and the treatment of the Notes as debt.

9
10 Dated: 3rd day of June, 2010

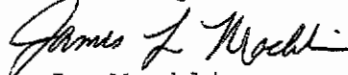
11 
12 James L. Macklin,
13 Pro-se

EXHIBIT E

EXHIBIT E

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8 Registration Systems, Inc., and Deutsche Bank National Trust
Co.

9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11 JAMES L. MACKLIN,
12 Plaintiff,

13 v.

14 SELECT PORTFOLIO SERVICING,
15 INC., et al.,
16 Defendants.

Case No. 2:10-CV-01097-FCD-KJN

ANSWER OF DEFENDANTS SELECT
PORTFOLIO, INC., MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC., AND DEUTSCHE BANK NATIONAL
TRUST CO. TO AMENDED COMPLAINT

17
18 Defendants Select Portfolio Servicing, Inc., Mortgage Electronic Registration Systems,
19 Inc., and Deutsche Bank National Trust Co. (hereinafter "SPS", "MERS", Deutsche Bank, or
20 Defendants) as and for their answer to the amended complaint plaintiff James L. Macklin
21 (hereinafter "Plaintiff") hereby admit, deny, and allege upon information and belief, as follows:

22 DEFENDANTS

23 1. SPS admits the allegations in the Amended Complaint at 2:25-3:4 that it is a
24 corporation registered to do business and does business in the State of California, and that
25 Matthew Hollingsworth is its Chief Executive Officer.

26 2. Plaintiff's allegations in the Amended Complaint at 3:6-25 involve persons or
27 entities other than these answering Defendants and otherwise consist of legal argument, and
28

1 therefore no response is required from these answering Defendants. To the extent 3:6-25 contain
2 factual allegations against these answering Defendants, Defendants deny the allegations.

3 3. MERS admits the allegations in the Amended Complaint at 3:27-4:27 that it has
4 not been registered to with the California Department of Corporations since 2004 and denies that
5 it is in violation of any state laws. The remaining allegations consist of legal argument, and
6 therefore no response is required from these answering Defendants. To the extent 3:27-4:27
7 contain factual allegations against these answering Defendants, Defendants deny the allegations.

8 4. Deutsche Bank admits the allegations in the amended complaint at 5:1-8 that it is
9 doing business in the State of California and that Robert E. Jackson and Amy E. Starrett are its
10 attorneys of record in a foreclosure action involving plaintiff James Macklin. Deutsche Bank
11 denies the remainder of the allegations in 5:1-8.

12 5. Plaintiff's allegations in the Amended Complaint at 5:10-13 involve persons or
13 entities other than these answering Defendants and therefore no response is required from these
14 answering Defendants.

15 6. Plaintiff's allegations in the Amended Complaint at 5:15-22 involve persons or
16 entities other than these answering Defendants and therefore no response is required from these
17 answering Defendants. To the extent 5:15-22 contain factual allegations against these answering
18 Defendants, Defendants deny the allegations.

19 7. Defendants deny the allegations in the Amended Complaint at 5:23-27.

20 JURISDICTION AND VENUE

21 8. Defendants admit that allegation in the Amended Complaint at 6:3-22 that the
22 Court has original jurisdiction pursuant to §§8 U.S.C. 1332.

23 9. Defendant Deutsche Bank admits the allegation in the Amended Complaint at
24 6:24-7:16 that Robert J. Jackson and Amy E. Starret are attorneys of record in the action entitled
25 *Deutsche Bank National Trust Co. v. Macklin*, California Superior Court, Placer County, Case
26 No. M-CV-45238. The remainder of Plaintiff's allegations in the Amended Complaint at 6:24-
27 7:16 involve persons or entities other than these answering Defendants and otherwise consist of
28 legal argument, and therefore no response is required from these answering Defendants. To the

1 extent 6:24-7:16 contain factual allegations against these answering Defendants, Defendants deny
2 the allegations.

3 10. Defendants admit the allegations in the Amended Complaint at 7:20-8:15 that
4 Plaintiff received a loan for real property from Accredited Home Lenders, Inc. and that MERS
5 was the nominee beneficiary on the Deed of Trust for the property at issue in this action. The
6 remainder of Plaintiff's allegations in the Amended Complaint at 7:20-8:15 involve persons or
7 entities other than these answering Defendants and otherwise consist of legal argument, and
8 therefore no response is required from these answering Defendants. To the extent 7:20-8:15
9 contain factual allegations against these answering Defendants, Defendants deny the allegations.

10 11. Defendants lack knowledge or information sufficient to form a belief as to the
11 allegations in the Amended Complaint at 8:17-9:3 and on that basis deny all such allegations.
12 The remainder of Plaintiff's allegations in the Amended Complaint at 8:17-9:3 involve persons or
13 entities other than these answering Defendants and otherwise consist of legal argument, and
14 therefore no response is required from these answering Defendants. To the extent 8:17-9:3
15 contain factual allegations against these answering Defendants, Defendants deny the allegations.

16 12. Defendants admit the allegations in the Amended Complaint at 9:5-8 that a Deed
17 of Trust for the subject property was signed on or about April 19, 2006 and a Promissory Note
18 was signed by plaintiff on or about April 14, 2006.

19 13. Defendants admit the allegations in the Amended Complaint at 9:10-10:6 that
20 Plaintiff made payments on the subject property commencing in May, 2006 through August,
21 2008. The remainder of Plaintiff's allegations in the Amended Complaint at 9:10-10:6 involve
22 persons or entities other than these answering Defendants and otherwise consist of legal
23 argument, and therefore no response is required from these answering Defendants. To the extent
24 9:10-10:6 contain factual allegations against these answering Defendants, Defendants deny the
25 allegations.

26 14. MERS admits that the allegations in the Amended Complaint at 10:8-20 that it
27 assigned the Deed of Trust to Deutsche Bank. The remainder of Plaintiff's allegations in the
28 Amended Complaint at 10:8-20 involve persons or entities other than these answering Defendants

1 and otherwise consist of legal argument, and therefore no response is required from these
2 answering Defendants. To the extent 10:8-20 contain factual allegations against these answering
3 Defendants, Defendants deny the allegations.

4 15. Defendants deny the allegations in the Amended Complaint at 10:22-11:7. The
5 remainder of Plaintiff's allegations in the Amended Complaint at 10:22-11:7 involve persons or
6 entities other than these answering Defendants and otherwise consist of legal argument, and
7 therefore no response is required from these answering Defendants. To the extent 10:22-11:7
8 contain factual allegations against these answering Defendants, Defendants deny the allegations.

9 CAUSES OF ACTION

10 16. Defendants deny the allegations contained in the Amended Complaint at 11:19-26.

11 17. Defendants deny the allegations in the Amended Complaint at 12:1-6.

12 18. The allegations in the Amended Complaint at 12:8-12 consist of legal argument,
13 and therefore no response is required from these answering Defendants. To the extent 12:8-12
14 contain factual allegations against these answering Defendants, Defendants deny the allegations.

15 19. The allegations in the Amended Complaint at 12:15-20 involve persons or entities
16 other than these answering Defendants and therefore no response is required from these
17 answering Defendants, except that MERS admits that it was the nominee of the Deed of Trust as
18 apparently alleged in the amended complaint at 12:15-20.

19 20. The allegations in the Amended Complaint at 12:22-13:6 consist of legal
20 argument, and therefore no response is required from these answering Defendants. To the extent
21 12:22-13:6 contain factual allegations against these answering Defendants, Defendants deny the
22 allegations.

23 21. The allegations in the Amended Complaint at 13:8-23 consist of legal argument,
24 and therefore no response is required from these answering Defendants. To the extent 13:8-23
25 contain factual allegations against these answering Defendants, Defendants deny the allegations.

26 22. The allegations in the Amended Complaint at 13:25-14:17 consist of legal
27 argument, and therefore no response is required from these answering Defendants. To the extent
28

1 13:25-14:17 contain factual allegations against these answering Defendants, Defendants deny the
2 allegations.

3 23. The allegations in the Amended Complaint at 14:19-15:4 consist of legal
4 argument, and therefore no response is required from these answering Defendants. To the extent
5 14:19-15:4 contain factual allegations against these answering Defendants, Defendants deny the
6 allegations.

7 24. The allegations in the Amended Complaint at 15:6-17 consist of legal argument,
8 and therefore no response is required from these answering Defendants. To the extent 15:6-17
9 contain factual allegations against these answering Defendants, Defendants deny the allegations.

10 25. The allegations in the Amended Complaint at 15:21-16:12 consist of legal
11 argument, and therefore no response is required from these answering Defendants. To the extent
12 15:21-16:12 contain factual allegations against these answering Defendants, Defendants deny the
13 allegations.

14 26. The allegations in the Amended Complaint at 16:14-21 consist of legal argument,
15 and therefore no response is required from these answering Defendants. To the extent 16:14-21
16 contain factual allegations against these answering Defendants, Defendants deny the allegations.

17 27. The allegations in the Amended Complaint at 16:23-17:3 consist of legal
18 argument, and therefore no response is required from these answering Defendants. To the extent
19 16:23-17:3 contain factual allegations against these answering Defendants, Defendants deny the
20 allegations. .

21 28. The allegations in the Amended Complaint at 17:7-24 consist of legal argument,
22 and therefore no response is required from these answering Defendants. To the extent 17:7-24
23 contain factual allegations against these answering Defendants, Defendants deny the allegations.

24 29. Defendants deny the factual allegations contained in the Amended Complaint at
25 17:26-18:9. The remainder of Plaintiff's allegations in the Amended Complaint at 17:26-18:9
26 involve persons or entities other than these answering Defendants and otherwise consist of legal
27 argument, and therefore no response is required from these answering Defendants. To the extent
28

1 17:26-18:9 contain factual allegations against these answering Defendants, Defendants deny the
2 allegations.

3 30. The allegations in the Amended Complaint at 18:16-19:14 consist of legal
4 argument, and therefore no response is required from these answering Defendants. To the extent
5 18:16-19:14 contain factual allegations against these answering Defendants, Defendants deny the
6 allegations.

7 31. Defendants deny that they owed a fiduciary duty to plaintiff as alleged in the
8 Amended Complaint at 19:15-20:2. The remainder of Plaintiff's allegations in the Amended
9 Complaint at 19:15-20:2 involve persons or entities other than these answering Defendants and
10 otherwise consist of legal argument, and therefore no response is required from these answering
11 Defendants. To the extent 19:15-20:2 contain factual allegations against these answering
12 Defendants, Defendants deny the allegations.

13 32. The allegations in the Amended Complaint at 20:4-25 involve persons or entities
14 other than these answering Defendants, and therefore no response is required from these
15 answering Defendants. To the extent 20:4-25 contain factual allegations against these answering
16 Defendants, Defendants deny the allegations.

17 33. The allegations in the Amended Complaint at 20:27-21:15 involve persons or
18 entities other than these answering Defendants, and therefore no response is required from these
19 answering Defendants. To the extent 20:27-21:15 contain factual allegations against these
20 answering Defendants, Defendants deny the allegations. Defendants deny any factual allegations
21 made against them in the amended complaint at 20:27-21:15.

22 34. The allegations in the Amended Complaint at 21:19-22:5 consist of legal
23 argument, and therefore no response is required from these answering Defendants. To the extent
24 21:19-22:5 contain factual allegations against these answering Defendants, Defendants deny the
25 allegations.

26 35. The allegations in the Amended Complaint at 22:7-16 consist of legal argument,
27 and therefore no response is required from these answering Defendants. To the extent 22:7-16
28 contain factual allegations against these answering Defendants, Defendants deny the allegations.

1 36. After reasonable investigation, SPS lacks information to admit or deny the
2 allegation in the Amended Complaint at 22:18-23:20 that on or about February 12, 2009 plaintiff
3 sent a letter to SPS and, on that basis, it denies the allegation. The remainder of Plaintiff's
4 allegations in the Amended Complaint at 22:18-23:20 involve persons or entities other than these
5 answering Defendants and otherwise consist of legal argument, and therefore no response is
6 required from these answering Defendants. To the extent 22:13-23:20 contain factual allegations
7 against these answering Defendants, Defendants deny the allegations.

8 37. Defendants deny that they committed any fraud as alleged in the Amended
9 Complaint at 23:25-24:17. The remainder of the allegations in the Amended Complaint at 23:25-
10 24:17 consist of legal argument, and therefore no response is required from these answering
11 Defendants. To the extent 23:25-24:17 contain factual allegations against these answering
12 Defendants, Defendants deny the allegations.

13 38. The allegations in the Amended Complaint at 24:22-25:12 involve persons or
14 entities other than these answering Defendants and otherwise consist of legal argument, and
15 therefore no response is required from these answering Defendants. To the extent 24:22-25:12
16 contain factual allegations against these answering Defendants, Defendants deny the allegations.

17 39. The allegations in the Amended Complaint at 25:14-24 involve persons or entities
18 other than these answering Defendants and otherwise consist of legal argument, and therefore no
19 response is required from these answering Defendants. To the extent 25:14-24 contain factual
20 allegations against these answering Defendants, Defendants deny the allegations.

21 40. The allegations in the Amended Complaint at 26:1-14 consist of legal argument,
22 and therefore no response is required from these answering Defendants. To the extent 26:1-14
23 contain factual allegations against these answering Defendants, Defendants deny the allegations.

24 41. Defendants deny any allegations of concealment that may be alleged in the
25 Amended Complaint at 26:16-27:2. The remainder of Plaintiff's allegations in the Amended
26 Complaint at 26:16-27:2 involve persons or entities other than these answering Defendants and
27 otherwise consist of legal argument, and therefore no response is required from these answering
28

1 Defendants. To the extent 26:16-27:2 contain factual allegations against these answering
2 Defendants, Defendants deny the allegations.

3 42. Defendants deny any allegations of fraud that may be alleged in the amended
4 complaint at 27:4-10. The remainder of Plaintiff's allegations in the Amended Complaint at 27:4-
5 10 involve persons or entities other than these answering Defendants and otherwise consist of
6 legal argument, and therefore no response is required from these answering Defendants. To the
7 extent 27:4-10 contain factual allegations against these answering Defendants, Defendants deny
8 the allegations.

9 43. The allegations in the Amended Complaint at 27:15-25 involve persons or entities
10 other than these answering Defendants and otherwise consist of legal argument, and therefore no
11 response is required from these answering Defendants. To the extent 27:15-25 contain factual
12 allegations against these answering Defendants, Defendants deny the allegations.

13 44. The allegations in the Amended Complaint at 27:27-28:11 consist of legal
14 argument, and therefore no response is required from these answering Defendants. To the extent
15 27:27-28:11 contain factual allegations against these answering Defendants, Defendants deny the
16 allegations.

17 45. The allegations in the Amended Complaint at 28:13-29:2 consist of legal
18 argument, and therefore no response is required from these answering Defendants. To the extent
19 28:13-29:2 contain factual allegations against these answering Defendants, Defendants deny the
20 allegations.

21 46. The allegations in the Amended Complaint at 29:4-17 involve persons or entities
22 other than these answering Defendants and otherwise consist of legal argument, and therefore no
23 response is required from these answering Defendants. To the extent 29:4-17 contain factual
24 allegations against these answering Defendants, Defendants deny the allegations.

25 47. The allegations in the Amended Complaint at 29:22-28 consist of legal argument,
26 and therefore no response is required from these answering Defendants. To the extent 29:22-28
27 contain factual allegations against these answering Defendants, Defendants deny the allegations.
28

1 48. The allegations in the Amended Complaint at 30:4-12 consist of legal argument,
2 and therefore no response is required from these answering Defendants. To the extent 30:4-12
3 contain factual allegations against these answering Defendants, Defendants deny the allegations.

4 49. The allegations in the Amended Complaint at 30:14-19 consist of legal argument,
5 and therefore no response is required from these answering Defendants. To the extent 30:14-19
6 contain factual allegations against these answering Defendants, Defendants deny the allegations.

7 50. Defendant MERS admits the allegations in the Amended Complaint at 30:21-31:6
8 that it is not been registered with the California Department of Corporations since 2004. MERS
9 further admits that it assigned its beneficial interest in the Deed of Trust to Deutsche Bank.
10 Deutsch Bank admits that it was the assignee of the Deed of Trust and SPS admits that it was the
11 servicer of the loan to purchase the subject property. The remainder of Plaintiff's allegations in
12 the Amended Complaint at 30:21-31:6 involve persons or entities other than these answering
13 Defendants and otherwise consist of legal argument, and therefore no response is required from
14 these answering Defendants. To the extent 30:21-31:6 contain factual allegations against these
15 answering Defendants, Defendants deny the allegations.

16 51. The allegations in the Amended Complaint at 31:8-9 consist of legal argument,
17 and therefore no response is required from these answering Defendants. To the extent 31:8-9
18 contain factual allegations against these answering Defendants, Defendants deny the allegations.

19 52. The allegations in the Amended Complaint at 31:12-20 consist of legal argument,
20 and therefore no response is required from these answering Defendants. To the extent 31:12-20
21 contain factual allegations against these answering Defendants, Defendants deny the allegations.

22 53. The allegations in the Amended Complaint at 31:21-28 consist of legal argument,
23 and therefore no response is required from these answering Defendants. To the extent 31:21-28
24 contain factual allegations against these answering Defendants, Defendants deny the allegations.

25 54. The allegations in the Amended Complaint at 32:5-13 consist of legal argument,
26 and therefore no response is required from these answering Defendants. To the extent 32:5-13
27 contain factual allegations against these answering Defendants, Defendants deny the allegations.

28

1 55. The allegations in the Amended Complaint at 32:15-17 consist of legal argument,
2 and therefore no response is required from these answering Defendants. To the extent 32:15-17
3 contain factual allegations against these answering Defendants, Defendants deny the allegations.

4 56. Defendants deny that they have inflicted any emotional distress as alleged in the
5 Amended Complaint at 32:19-33:2. The remainder of Plaintiff's allegations in the Amended
6 Complaint at 32:19-33:2 involve persons or entities other than these answering Defendants and
7 otherwise consist of legal argument, and therefore no response is required from these answering
8 Defendants. To the extent 32:19-33:2 contain factual allegations against these answering
9 Defendants, Defendants deny the allegations.

10 57. The allegations in the Amended Complaint at 33:4-12 consist of legal argument,
11 and therefore no response is required from these answering Defendants. To the extent 33:4-12
12 contain factual allegations against these answering Defendants, Defendants deny the allegations.

13 58. Defendants deny the allegations in the Amended Complaint at 33:14-19.

14 59. Defendants deny the allegations in the Amended Complaint at 33:23-34:6.

15 60. Defendants deny the allegations in the Amended Complaint at 34:8-16.

16 61. Defendants deny the allegations in the Amended Complaint at 34:18-35:2.

17 AFFIRMATIVE DEFENSES

18 1. As a first affirmative defense, defendants allege that the amended complaint and
19 each cause of action therein fails to state the facts sufficient to constitute a cause of action against
20 defendants.

21 2. As a second affirmative defense, defendants allege that the causes of action are
22 barred by applicable statutes of limitation including 12 U.S.C. §§ 2605, 2607 and 2608; 15 U.S.C.
23 § 1640(e) and California Code of Civil Procedure §§ 336, 337, 338, 340 and 343.

24 3. As a third affirmative defense, defendants allege that plaintiff unreasonably
25 delayed in filing his amended complaint, that defendants have been unduly and severely
26 prejudiced by the delay, and his claims are therefore barred under the doctrine of laches.

27 4. As a fourth affirmative defense, defendants allege that plaintiff's claims are barred
28 under the doctrine of estoppel.

1 5. As a fifth affirmative defense, defendants allege that plaintiff has engaged in
2 conduct and activities sufficient to constitute a waiver of any alleged conduct by defendants, if
3 any, all which has unduly and severely prejudiced defendants in their defense of this action,
4 thereby barring or diminishing plaintiff's claims under the doctrine of waiver.

5 6. As a sixth affirmative defense, defendants allege that plaintiff's claims are barred
6 by the doctrines of collateral estoppel and res judicata.

7 7. As a seventh affirmative defense, defendants allege that plaintiff has unclean
8 hands with respect to the transactions alleged in the amended complaint and, therefore, is barred
9 from maintaining his complaint.

10 8. As an eighth affirmative defense, defendants allege that plaintiff's complaint is
11 frivolous and not based on good faith as to defendants within the meaning of Rule 11 of the
12 Federal Rules of Civil Procedure and therefore defendants are entitled to recover their reasonable
13 expenses, including attorneys' fees in defending this action.

14 9. As a ninth affirmative defense, defendants are informed and believe, and thereon
15 allege, that plaintiff has failed to name an indispensable and/or necessary party.

16 10. As a tenth affirmative defense, defendants allege that they have appropriately,
17 completely and fully discharged and performed any and all obligations and legal duties arising
18 out of the matters alleged in the amended complaint.

19 11. As an eleventh affirmative defense, defendants allege that plaintiff consented to all
20 acts that were performed by defendants as alleged in the amended complaint.

21 12. As a twelfth affirmative defense, defendants allege that defendants acted
22 reasonably and exercised good faith.

23 13. As a thirteenth affirmative defense, defendants allege that plaintiff has failed to
24 pay, tender, or offer to pay the secured debt, or at least all of the delinquencies and costs due for
25 redemption before commencing his action.

26 14. As a fourteenth affirmative defense, defendants allege that the damages suffered
27 by plaintiff, if any, were the direct and proximate result of the actions of plaintiff and/or other
28 parties, persons, corporations or entities other than these answering defendants and that the

1 liability of these defendants, if any, is limited in direct proportion to the percentage of fault
2 actually attributed to these answering defendants, if any.

3 15. As a fifteenth affirmative defense, defendants allege that plaintiff has failed to
4 exercise reasonable care and diligence to avoid loss and to minimize damages and, therefore,
5 plaintiff may not recover for losses which could have been prevented by reasonable efforts on
6 plaintiff's own part, or by expenditures that might reasonably have been made and, therefore,
7 plaintiff's recovery, if any, should be reduced by the failure of plaintiff to mitigate his damages, if
8 any.

9 16. As a sixteenth affirmative defense, defendants allege that the injuries and damages
10 of which plaintiff complains were proximately caused or contributed to by the acts of plaintiff
11 and/or the defendants, persons and/or entities and that said acts or an intervening or a superseding
12 cause of injuries and damages, if any, of which the plaintiff complains, thus barring the plaintiff
13 from any recovery against these answering defendants.

14 17. As a seventeenth affirmative defense, defendants allege that any recovery by
15 plaintiff against defendants is subject to these answering defendants' right to offset.

16 18. As an eighteenth affirmative defense, defendants allege that the damages suffered
17 by plaintiff, if any, were the direct and proximate result of the acts and omissions of plaintiff.

18 19. As a nineteenth affirmative defense, defendants allege that plaintiff has engaged in
19 conduct and activities with respect to the transaction described in the amended complaint, and is
20 estopped from asserting any claims or damages or seeking any relief against these answering
21 defendants.

22 20. As a twentieth affirmative defense, defendants allege that plaintiff engaged in
23 improper, retaliatory, and bad faith conduct against these answering defendants and thus
24 plaintiff's recovery is barred or reduced proportionately to reflect such conduct.

25 21. As a twenty-first affirmative defense, defendants allege that discovery is ongoing
26 and defendants reserve the right to raise additional affirmative defenses at trial.

27 ///

28 ///

1 WHEREFORE, Defendants Select Portfolio Servicing, Inc., Mortgage Electronic
2 Registration Systems, Inc., and Deutsche Bank National Trust Co. pray for judgment as follows:

- 3 1. That plaintiff take nothing by way of the amended complaint.
4 2. For costs of suit incurred herein, including investigative costs and attorneys' fees,
5 and;
6 3. For such other and further relief as the Court deems just and proper.

7
8 Dated: June 24, 2010

CARR, McCLELLAN, INGERSOLL,
THOMPSON & HORN
Professional Law Corporation

9
10
11 By: 

Robert A. Bleicher
Attorneys for Defendants
Select Portfolio Servicing, Inc., Mortgage
Electronic Registration Systems, Inc., and
Deutsche Bank National Trust Co.

EXHIBIT F

EXHIBIT F

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES L. MACKLIN,

Plaintiff,

v.

SELECT PORTFOLIO SERVICING,
INC., et al.,

Defendants.

Case No. 2:10-CV-01097-FCD-KJN

**DEFENDANTS SELECT PORTFOLIO,
INC., MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AND
DEUTSCHE BANK NATIONAL TRUST
CO.'S NOTICE OF MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT**

Date: September 23, 2010
Time: 10:00 a.m.
Courtroom: 25
Judge: Hon. Kendall J. Newman

1 TO PLAINTIFF:

2 PLEASE TAKE NOTICE that on September 23, 2010, at 10:00 a.m., or as soon thereafter
3 as the matter may be heard, in Courtroom 25 of the above-entitled Court located at 501 I Street,
4 Sacramento, California, Defendants Select Portfolio Servicing, Inc. ("SPS"), Mortgage Electronic
5 Registration Systems, Inc. ("MERS"), and Deutsche Bank National Trust Co. ("Deutsche Bank")
6 will and do move this Court, the Honorable Kendall J. Newman presiding, for summary judgment
7 or, in the alternative, summary adjudication pursuant to Federal Rules of Civil Procedure, Rule
8 56.

9 This motion will be and is based on this Notice of Motion, the attached Memorandum of
10 Points and Authorities, the declaration of Diane Weinberger, and the Separate Statement of
11 Undisputed Facts filed herewith, the pleadings and papers already on file in this action, and on
12 such other and further matters as the Court may consider before or at the hearing of this motion.

13 Dated: August 19, 2010

14
15 CARR, McCLELLAN, INGERSOLL, THOMPSON & HORN
16 Professional Law Corporation

17
18 By: _____



19 Lori A. Lutzker
20 Attorneys for Defendants
21 Select Portfolio Servicing, Inc., Mortgage Electronic
22 Registration Systems, Inc., and Deutsche Bank National
23 Trust Co.
24
25
26
27
28

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff James Macklin objects to the foreclosure of property located at 10040 Wise Road in Auburn, California (the "Property") -- even though he does not contest that he borrowed \$659,000 and stopped making payments on the Note. His complaint consists of only conclusory allegations and legal arguments, many of which have nothing to do with these Defendants, who did not make the loan or act as his loan broker. Deutsche Bank is the Lender's assignee. MERS is the beneficiary under the Deed of Trust. SPS is the loan servicer.

The caption on the first amended complaint purports that the pleading alleges seven claims. The first amended complaint is so vague, ambiguous, and largely unintelligible that Defendants are unsure exactly what claims are being asserted. This motion reflects Defendants' good faith effort to address all possible claims being asserted in the first amended complaint. However many there are, it will be established that none of them are legally or factually viable.

II. FACTS

The material facts are undisputed and straightforward. Plaintiff's claims are all based upon activities relating to a residential mortgage loan transaction. In April, 2006, Plaintiff borrowed \$659,000 from Accredited Home Lenders, Inc. (the "Lender"). The loan was secured by a deed of trust for \$532,000 (the "Deed of Trust") and a junior deed of trust for \$127,000. The Deed of Trust named MERS as beneficiary and as nominee for the Lender. (Undisputed Fact Nos. 1-3.)

Plaintiff made some of his loan payments, but subsequently became delinquent in his loan payments and the foreclosure process was initiated. (Undisputed Fact No. 4.)

On December 8, 2008, Windsor Management Co., as agent for MERS, recorded a Notice of Default and Election to Sell under Deed of Trust. (Undisputed Fact No. 5.)

MERS, as nominee for the Lender, assigned the Deed of Trust to Deutsche Bank, as Indenture Trustee, on Behalf of the Holders of the Accredited Mortgage Loan Trust 2006-2 Asset Backed Notes ("Deutsche Bank Trust"). (Undisputed Fact No. 6.) SPS began servicing the Deed of Trust on March 1, 2009 and is the current loan servicer and attorney-in-fact for the Deutsche

1 Bank Trust, the owner of the Deed of Trust. (Undisputed Fact No. 7.)

2 On March 10, 2009, Windsor Management Co. recorded a Notice of Trustee's sale.
3 (Undisputed Fact No. 8.)

4 On August 21, 2009, Deutsche Bank substituted Quality Loan Service Corp. as Trustee
5 under the Deed of Trust. (Undisputed Fact No. 9.)

6 Between November 23 and November 25, 2009, Quality Loan Service Corp. recorded,
7 served on Plaintiff by certified mail, posted on the property, and published a Notice of Trustee's
8 Sale advising Plaintiff that unless he paid \$577,103.98, the property would be sold on December
9 14, 2009. (Undisputed Fact No. 10.)

10 Plaintiff never tendered payment and the property was sold. At the time of the sale, the
11 amount of the unpaid debt with costs was \$623,986.20. Plaintiff has not offered to tender the
12 amounts due under the loan. (Undisputed Fact No. 11.)

13 III. LEGAL ANALYSIS

14 A. Summary Judgment Standard

15 Summary judgment is appropriate when it is demonstrated that the standard set forth in
16 Federal Rules of Civil Procedure Rule 56(c) is met. "The judgment sought should be rendered if
17 . . there is no genuine issue as to any material fact, and that the movant is entitled to judgment as
18 a matter of law." Fed. R. Civ. P. 56(c).

19 Under summary judgment practice, the moving party always bears
20 the initial responsibility of informing the district court of the basis
21 for its motion, and identifying those portions of "the pleadings,
22 depositions, answers to interrogatories, and admissions on file,
together with the affidavits, if any," which it believes demonstrate
the absence of a genuine issue of material fact.

23 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

24 "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue,
25 a summary judgment motion may properly be made in reliance solely on the 'pleadings,
26 depositions, answers to interrogatories, and admissions on file.'" *Id.* "[A] complete failure of
27 proof concerning an essential element of the nonmoving party's case necessarily renders all other
28 facts immaterial." *Id.* at 323. In such a circumstance, summary judgment should be granted, "so

1 long as whatever is before the district court demonstrates that the standard for entry of summary
2 judgment, as set forth in Rule 56(c), is satisfied.” *Id.*

3 If the moving party meets its initial responsibility, the burden then shifts to the opposing
4 party to establish that a genuine issue as to any material fact actually does exist. *Matsushita*
5 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the
6 existence of this factual dispute, the opposing party may not rely upon the allegations or denials
7 of its pleadings, but is required to tender evidence of specific facts. Fed. R. Civ. P. 56(e);
8 *Matsushita, supra*, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in
9 contention is material, i.e., that it might affect the outcome of the suit under the governing law.
10 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec.*
11 *Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). He must also establish that the dispute is
12 genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving
13 party. *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

14 All reasonable inferences that may be drawn from the facts placed before the court must
15 be drawn in favor of the opposing party. *Matsushita, supra*, 475 U.S. at 587. Nevertheless,
16 inferences are not drawn out of the air, and it is the opposing party’s obligation to produce a
17 factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602
18 F.Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff’d*, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to
19 demonstrate a genuine issue, the opposing party “must do more than simply show that there is
20 some metaphysical doubt as to the material facts . . . Where the record taken as a whole could not
21 lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’”
22 *Matsushita, supra*, 475 U.S. at 586 (citation omitted).

23 **B. Plaintiff’s Failure To Tender Precludes His Attack On The Foreclosure**

24 The entire complaint purports to challenge Defendants’ attempt to conduct a valid
25 foreclosure sale on the property. However, as a precondition to challenging a foreclosure sale,
26 the borrower must, in good faith and with the ability to perform, make an unconditional offer to
27 pay, or pay, the secured debt prior to the foreclosure sale. Cal. Civ. Code §§ 1487 (full
28 performance), 1493 (good faith), 1494 (unconditional), 1495 (offer or must have the ability to

1 perform).

2 The failure to tender bars any cause of action challenging the foreclosure, including
3 causes of action for wrongful foreclosure, to set aside the sale, and cancellation of the trustee's
4 deed. Cal. Civ. Code §§ 1487, 1493, 1494, 1495; see also *Arnolds Management Corp. v. Eischen*
5 (1984) 158 Cal.App.3d 575, 578-580 ["an action to set aside a trustee's sale for irregularities in
6 sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for
7 which the property was security."]; *Karlsen v. American Sav. & Loan Assoc.* (1971) 15
8 Cal.App.3d 112, 117.

9 This "tender rule" is based upon the equitable maxim that a court of equity will not order a
10 useless act performed. *Arnolds, supra*, at 578-579. "To hold otherwise would permit plaintiffs to
11 state a cause of action without the necessary element of damage to themselves." *Id.* at 580. "The
12 rationale behind the rule is that if plaintiffs could not have redeemed the property had the sale
13 procedures been proper, any irregularities in the sale did not result in damages to the plaintiffs."
14 *Fpci Re-Hab 01 v. E & G Invs.*, 207 Cal.App.3d 1018, 1022 (1989).

15 In *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167 (9th Cir. 2003), the plaintiffs refinanced a
16 mortgage loan; their loan was assigned to the assignee. The plaintiffs defaulted and attempted to
17 rescind the loan, claiming that they were not provided with disclosures required by TILA.
18 Although the district court found a triable issue of fact existed as to whether the plaintiffs
19 received the disclosures, the district court granted summary judgment for the assignee because the
20 plaintiffs were unable to tender the loan proceeds. The appellate court affirmed that the district
21 court had the discretion to condition rescission on tender of the proceeds.

22 Here, the foreclosure was the inevitable result of Plaintiff's default. Since he has not
23 alleged an ability to tender the amount due, he cannot claim to have been damaged. See *Labra v.*
24 *Cal-Western Reconveyance Corp.*, 2010 U.S. Dist. LEXIS 23165 (N.D. Cal. Mar. 11, 2010).

25 C. Defendants Have Standing

26 As best Defendants can tell, Plaintiff is asserting that only the Lender has standing to
27 foreclose or that no one has standing because the original note has been "split" from the Deed of
28

1 Trust.¹ Neither reflects a correct understanding of the law.

2 Under California Civil Code section 2924(a)(1), a “trustee, mortgagee or beneficiary or
3 any of their authorized agents may conduct the foreclosure process.” *Coyotzi v. Countrywide Fin.*
4 *Corp.*, No. 09-1036, 2009 U.S. Dist. LEXIS 91084, *53 (E.D. Cal. Sept. 16, 2009). Indeed,
5 under California law one of the primary duties of the trustee is “to initiate nonjudicial foreclosure
6 on the property upon the trustor’s default, resulting in a sale of the property.” *Kachlon v.*
7 *Markowitz*, 168 Cal.App.4th 316, 334 (2008). The beneficiary is free to make a substitution of
8 the trustee in order to conduct the foreclosure sale. See *Id.*; Cal. Civ. Code §§ 2934(a),
9 2924(b)(4).

10 In *Reynoso v. Paul Fin., LLC*, 2009 U.S. Dist. LEXIS 106555, 7-8 (N.D. Cal. Nov. 16,
11 2009), MERS was initially named as beneficiary and, accordingly, possessed the power of sale
12 upon default, which it could transfer to a trustee. MERS later transferred its interest to BNYM,
13 which in turn named Quality as the substituted trustee. The court held that Quality held the right
14 to initiate the foreclosure sale. See also *Berenice Thoreau de la Salle v. America's Wholesale*
15 *Lender*, 2010 U.S. Dist. LEXIS 36319 (E.D. Cal. Apr. 13, 2010) [“Defendant MERS is the
16 nominee, as established by the Deed of Trust, and has the right to initiate foreclosure
17 proceedings.”], citing *Swanson v. EMC Mortgage Corp.*, 2009 U.S. Dist. LEXIS 107912, 2009
18 WL 3627925 (E.D. Cal. 2009) [MERS is properly designated beneficiary under deed of trust and
19 has authority to commence non-judicial foreclosures]. There simply is no legal authority for the
20 proposition that only the Lender can foreclose.

21 Likewise, the idea that possession of the original note is a prerequisite to foreclosure has
22 been consistently rejected by this court and others. *Reynoso v. Paul Fin., LLC*, 2009 U.S. Dist.
23 LEXIS 106555, 14-15 (N.D. Cal. Nov. 16, 2009) [“Under Civil Code section 2924, no party
24 needs to physically possess the promissory note.”]; *Sicairos v. NDEX West, LLC*, 2009 U.S. Dist.
25 LEXIS 11223, *7 (S.D. Cal. 2009), citing Cal. Civ. Code, § 2924(a)(1); *Lomboy v. SCME*
26 *Mortgage Bankers*, No. 09-1160, 2009 U.S. Dist. LEXIS 44158, * 12-13 (N.D. Cal. May 26,

27
28 ¹ See First Amended Complaint, pp. 11:13-17:3.

2009) ["Under California law, a trustee need not possess a note in order to initiate foreclosure under a deed of trust."]; *Mesde v. Am. Brokers Conduit*, 2009 U.S. Dist. LEXIS 59632 (N.D. Cal. June 30, 2009), citing *Putkkuri v. ReconTrust Co.*, 2009 U.S. Dist. LEXIS 32, 2009 WL 32567, at *2 (S.D. Cal. Jan. 5, 2009) ["p]ursuant to section 2924(a)(1) of the California Civil Code, the trustee of a Deed of Trust has the right to initiate the foreclosure process. Production of the original note is not required to proceed with a non-judicial foreclosure."]; *Candelo v. Ndex West, LLC*, 2008 U.S. Dist. LEXIS 105926, 2008 WL 5382259, at *4 (E.D. Cal. Dec. 23, 2006) ["[n]o requirement exists under the statutory framework to produce the original note to initiate non-judicial foreclosure."].

D. The Fair Debt Collection Practices Act Is Inapplicable

Plaintiff alleges that SPS violated 15 U.S.C. 1692(g)(b), the Fair Debt Collection Practices Act ("FDCPA").² The assertion is premised on the idea that SPS is a "debt collector." The statute defines "debt collectors" to include "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . ." 15 U.S.C. 1692(a)(6).

The courts have repeatedly held that mortgagees and mortgage servicing companies are not debt collectors under the FDCPA and the California nonjudicial foreclosure statutes. *Berenice Thoreau de la Salle v. America's Wholesale Lender*, 2010 U.S. Dist. LEXIS 36319, 2-3 (E.D. Cal. Apr. 13, 2010), citing *Scott v. Wells Fargo Home Mortg., Inc.*, 326 F. Supp. 2d 709, 718 (E. D. Va.), *aff'd*, 67 Fed. Appx. 238 (4th Cir. 2003) ["mortgagors [sic] and mortgage servicing companies" are not debt collectors under FDCPA]; 15 U.S.C. § 1692(a)(6)(A) [under FDCPA, "debt collector" is defined as one who collects consumer debts owed to another, not including an officer or employee of a creditor while collecting debts in the name of the creditor]. The law is clear: foreclosing on a property pursuant to a deed of trust is not "debt collection" within the meaning of the FDCPA. *Gamboa v. Tr. Corps & Cent. Mortg. Loan Servicing Co.*, 2009 U.S. Dist. LEXIS 19613, *11 (N.D. Cal. Mar. 12, 2009).

² See First Amended Complaint, pp. 17:5-18:9. This claim does not appear to be directed at the other Defendants.

E. **Defendants Do Not Owe Plaintiff A Fiduciary Duty**

Plaintiff's next claim seems to be for breach of fiduciary duty.³ None of Defendants owes a fiduciary duty to Plaintiff. "As a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal.App.3d 1089, 1096 (1991), citing *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 34-35; *Fox & Carskadon Financial Corp. v. San Francisco Fed. Sav. & Loan Assn.* (1975) 52 Cal.App.3d 484, 488, 489; *Bradler v. Craig* (1969) 274 Cal.App.2d 466, 473, 476. "Thus, for example, a lender has no duty to disclose its knowledge that the borrower's intended use of the loan proceeds represents an unsafe investment. *Wagner v. Benson, supra*, 101 Cal.App.3d at pp. 33-35. A lender does not have a duty to disclose to a borrower that he does not have the ability to repay the loan. *Cross v. Downey Sav. & Loan Ass'n*, No. CV 09-317 CAS (SSx), 2009 WL 481482, at *5 (C.D. Cal. Feb. 23, 2009).

This rule applies to loan servicers as well. *Tsien v. Wells Fargo Home Mortg.*, 2010 U.S. Dist. LEXIS 52804 (N.D. Cal. May 28, 2010), citing *Bojorquez v. Gutierrez*, No. C 09-03684 SI, 2010 U.S. Dist. LEXIS 28302 (N.D. Cal. Mar. 25, 2010) at *20; *Huerta v. Ocwen Loan Servicing, Inc.*, No. 09-5822 JF, 2010 U.S. Dist. LEXIS 17970, *11 (N.D. Cal. Mar. 1, 2010) [requiring plaintiff to allege how defendants exceeded the scope of their conventional role as a loan servicers such that they assumed a fiduciary duty]. This court has agreed: see *Woods v. Greenpoint Mortg. Funding, Inc.*, 2010 U.S. Dist. LEXIS 41492, 25-26 (E.D. Cal. Apr. 27, 2010), citing *Watts v. Decision One Mortg. Co.*, No. 09-43 2009 U.S. Dist. LEXIS 59694 (S.D. Cal. July 13, 2009) and *Marks v. Ocwen Loan Servicing*, No. 07-2133, 2009 U.S. Dist. LEXIS 35251, 2009 WL 975792, at *7 (N.D. Cal. Apr. 10, 2009) ["loan servicer does not owe a fiduciary duty to a borrower beyond the duties set forth in the loan contract."]

There is no basis in law or fact for the claim that any of Defendants owed Plaintiff a fiduciary duty.

³ First Amended Complaint, pp. 18:11-21:15.

F. Any Alleged Right To Rescind Under The Truth In Lending Act Is Time-Barred

Under the heading “Right to Rescission,” Plaintiff claims that he has a right to rescission under the Truth in Lending Act, 15 U.S.C. § 1635(a) (“TILA”).⁴ A TILA claim begins to run when on the date the transaction underlying the alleged violations was “consummated.” *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986). 15 USCS 1635(f) completely extinguishes the right to rescind a home loan transaction after three years; a borrower may *not* assert the right of rescission as an affirmative defense in the lender’s collection action brought more than three years after the transaction’s consummation. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (U.S. 1998).

The expiration for the right of rescission cannot be tolled because “§ 1635 is a statute of repose, depriving the courts of subject matter jurisdiction when a § 1635 claim is brought outside the three year limitation period.” *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir. 2002); see also *Beach v. Ocwen Fed. Bank*, *supra*, 523 U.S. at 417 [“Section 1635(f) . . . talks not of a suit’s commencement but of a right’s duration . . .”]; *D’Onofrio v. United States Bank*, No. 09-3701, 2009 U.S. Dist. LEXIS 95057, *4 (N.D. Cal. Oct 13, 2009) [“The three-year statute of limitation for TILA rescission claims is absolute; it cannot be tolled.”].

Plaintiff alleges he has a right to rescind under TILA. The loan was made in April 14, 2006. The complaint was filed on April 2, 2010. Plaintiff waited almost four years to make a TILA claim. The right to rescission, if any existed, is time-barred.

G. Defendants Did Not Breach TILA By Misrepresenting The Value Of The Dwelling

Next, Plaintiff recites that TILA is violated by making misrepresentations or encouraging an appraiser to make misrepresentations about the value of his dwelling.⁵ None of Defendants was involved in the loan origination. None of them had anything to do with the valuation of the dwelling. Plaintiff recognizes this as well. He claims that the “Broker on behalf of the Lender” misrepresented the value and the Lender negligently relied on the misrepresentation. Leaving aside the fact that a lender does not have a duty to disclose to a borrower that he does not have the

⁴ First Amended Complaint, pp. 21:17-24:17.

⁵ First Amended Complaint, pp. 24:19-25:24.

1 ability to repay the loan (*Cross v. Downey Sav. & Loan Ass'n, supra*, No. CV 09-317 CAS (SSx),
2 2009 WL 481482, at *5), these allegations do not indicate that Defendants have any liability.

3 Further, Plaintiff's claims are time-barred. As discussed above, Plaintiff had three years
4 to seek rescission. 15 U.S.C.S. § 1635(f). A damages claim must be filed within one year from
5 the inception of the transaction. 15 U.S.C. § 1640(e); *King v. California*, 784 F.2d 910, 913-15
6 (9th Cir. 1986), cert. den. 484 U.S. 802 (1987); *Wachtel v. West*, 476 F.2d 1062, 1065-1666 (6th
7 Cir. cert. de. 414 U.S. 874 (1973). This complaint was not filed until almost four years after the
8 loan was taken.

9 **H. Defendants Did Not Commit Fraud**

10 Plaintiff alleges that Defendants committed fraud by concealment.⁶ Exactly what fraud
11 was allegedly committed is a mystery. Fraud claims asserted in federal court must comply with
12 the requirements of Federal Rule of Civil Procedure 9(b), which provides that allegations of fraud
13 must be stated with particularity. Fed. R. Civ. P. 9(b). "Rule 9(b) does not allow a complaint to
14 merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations
15 when suing more than one defendant . . . and inform each defendant separately of the allegations
16 surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 765-66
17 (9th Cir. 2007). Plaintiff's fraud cause of action fails to meet these standards.

18 Plaintiff seems to allege that Defendants were under a duty to disclose that the loan was
19 for a higher amount than what the application deserved. Defendants did not originate the loan; it
20 is an absurdity to say that they concealed from Plaintiff material facts about the loan.
21 Furthermore, as discussed above, not even the lender had the duty to disclose that the borrower
22 does not have the ability to repay. *Cross v. Downey Sav. & Loan Ass'n, supra*, No. CV 09-317
23 CAS (SSx), 2009 WL 481482, at *5. None of Defendants had a duty to disclose that the loan was
24 too large and, indeed, they did not even have the opportunity to do so.

25 Plaintiff's allegations include that by sanctioning a loan for a higher amount than what the
26 application deserved, Defendants increased their fees and the Lender did not utilize its own assets
27

28 ⁶ First Amended Complaint, p. 25:26, see also pp. 26:1-27:10.

1 in making the loan and exchanged the Note at a discount. Again, none of Defendants were
2 involved in the origination of this loan. And, in any event, none of these actions caused damage
3 to Plaintiff.

4 **I. Defendants Did Not Violate Plaintiffs' Constitutional Due Process Rights**

5 Plaintiff's complaint alleges violations of due process.⁷ Plaintiff's claims must arise, then,
6 under 42 U.S.C. § 1983. A claim under section 1983, however, only exists when the alleged
7 deprivation was committed "under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526
8 U.S. 40, 49-50 (1999); see U.S. Const. Amend. XIV ["[n]o state shall ... deprive any person of
9 life, liberty, or property, without due process of law ... [or] deny to any person within its
10 jurisdiction the equal protection of the laws."]. In other words, a private contract between
11 nongovernmental parties cannot be the basis of a violation of the Fourteenth Amendment, which
12 applies only to governmental entities. *Phillips v. Fremont Inv. & Loan*, 2009 U.S. Dist. LEXIS
13 122152, 2009 WL 4898259, *2 (D. Ariz. Dec. 11, 2009).

14 This case concerns a non-judicial foreclosure predicated on a contract signed by private
15 parties. A private remedy such as non-judicial foreclosure does not involve state action. *Apao v.*
16 *Bank of N.Y.*, 324 F.3d 1091, 1095 (9th Cir. 2003); *Earl v. Wachovia Mortg. FSB*, 2010 U.S. Dist.
17 LEXIS 57552, 7-8 (D. Ariz. June 8, 2010). A cause of action alleging a violation of due process
18 in a complaint challenging the foreclosure of a home fails where the defendants are not state
19 actors. *Berenice Thoreau de la Salle v. America's Wholesale Lender*, 2010 U.S. Dist. LEXIS
20 36319 (E.D. Cal. Apr. 13, 2010). Defendants are not state actors.

21 Plaintiff also alleges that his due process rights were violated because the deed-of-trust is
22 an unenforceable as a "cognovit note." The same claim was made in *Earl v. Wachovia Mortg.*
23 *FSB*, 2010 U.S. Dist. LEXIS 57552, 8-9 (D. Ariz. June 8, 2010). The court dismissed the claim
24 with prejudice:

25 "The cognovit is the ancient legal device by which the debtor
26 consents in advance to the holder's obtaining a judgment without
27 notice or hearing, and possibly even with the appearance, on the
debtor's behalf, of an attorney designated by the holder." *D. H.*

28 ⁷ First Amended Complaint, pp. 27:12-28:11.

1 *Overmyer Co. Inc., of Oh. v. Frick Co.*, 405 U.S. 174, 177, 92 S. Ct.
2 775, 31 L. Ed. 2d 124 (1972). This claim, the Court assumes is also
3 a constitutional claim, as the Supreme Court has held that cognovit
4 notes, under certain circumstances can violate due process rights.
5 See *Id.* at 187 (“Our holding necessarily means that a cognovit
6 clause is not, per se, violative of Fourteenth Amendment due
7 process.”). Plaintiff appears to argue that the power-of-sale clause
8 authorizing a non-judicial foreclosure in the deed-of-trust is
9 cognovit because non-judicial foreclosure does not allow for a
10 hearing in a court of law. A non-judicial foreclosure, is, by
11 definition, not a judicial proceeding, and a power-of-sale clauses
12 does not allow a creditor to seek judgment against a debtor, but
13 merely allow the creditor to obtain title to the collateral as a result
14 of default. Accordingly, no judicial proceeding was contemplated
15 or took place at which Plaintiff was denied notice or not permitted
16 to appear. There was, then, no state action which might support a
17 constitutional claim. Additionally, the facts asserted do not
18 demonstrate in any way whatsoever that the deed-of-trust was a
19 cognovit note. In short, Plaintiff cannot proceed under a cognovit
20 note theory and this Court must dismiss her claim with prejudice.

21 This is exactly the case here. Summary judgment should be granted.

22 **J. California Law Was Followed**

23 Next, Plaintiff discusses California’s non-judicial statutory foreclosure law.⁸ He claims
24 Defendants did not adhere to it because the assignments have been falsely presented. This claim
25 is unintelligible. To the extent Plaintiff is rearguing Defendants’ standing to foreclose, that issue
26 has been addressed.

27 **K. California’s Unfair Competition Law Was Not Violated**

28 Plaintiff claims that Defendants violated the Unfair Competition Law (“UCL”), California
Business and Professions Code §§ 17200 et seq., which forbids acts of unfair competition,
including “any unlawful, unfair or fraudulent business act or practice.”⁹ Cal. Bus. & Prof. Code §
17200.

A defendant’s liability must be based on his or her personal participation in the unlawful
practices. *Emery v. Vista Int’l Serv. Ass’n*, 95 Cal.App.4th 952, 962 (2002). Accordingly,
Plaintiff must have facts showing that SPS engaged in an unlawful, unfair or fraudulent business
act or practice; other facts showing that MERS engaged in an unlawful, unfair or fraudulent
business act or practice; and additional facts showing that Deutsche Bank engaged in an unlawful,

⁸ First Amended Complaint, pp. 28:13-29:17.

⁹ First Amended Complaint, pp. 29:19-31:28.

1 unfair or fraudulent business act or practice. There are no such facts.

2 Also the UCL “borrows” violations of other laws when committed pursuant to a business
3 activity. *Farmers Ins. Exchange v. Superior Court*, 2 Cal.4th 377, 383 (1992). Accordingly, a
4 cause of action under the UCL must be based on some predicate act that violates **another law**.
5 *Cal-Tech Communications v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1990). Plaintiff claims
6 that the other laws are 12 U.S.C. §§ 2605 et seq., the Real Estate Settlement Procedures Act
7 (“RESPA”), and “predatory lending.” Neither saves Plaintiff’s UCL claim.

8 1. **RESPA**

9 Plaintiff claims that the RESPA was violated because he was not made aware of the
10 Lender’s intention to “split the Note and the Deed” and MERS is not registered with the
11 California Department of Corporations so the assignment to MERS is unlawful.

12 To begin with, the claims under RESPA are time-barred. An action alleging a violation of
13 12 U.S.C. § 2605 must be brought within three years of the violation; an action alleging violations
14 of §§ 2607 or 2608 must be brought within one year of the violation. The date from which the
15 statute of limitations commences to run is the date the loan transaction closed, here, April 2006.
16 (See *Lee v. Aurora Loan Servs.*, 2010 U.S. Dist. LEXIS 56094, 4-5 (N.D. Cal. May 18, 2010);
17 *McGill v. Wachovia Mortg., FSB Loan*, 2010 U.S. Dist. LEXIS 43393, 22-23 (E.D. Cal. Mar. 3,
18 2010).) It has been almost four years since this loan transaction closed. Accordingly, Plaintiff
19 cannot state a claim under the UCL based on a violation of RESPA.

20 Further, a claim for a RESPA violation must include facts showing how the plaintiff
21 suffered actual harm due to the defendant’s actions. See *Benham v. Aurora Loan Servs.*, No. C-
22 09-2059 SC, 2009 U.S. Dist. LEXIS 91287, at *10-11 (N.D. Cal. Oct. 1, 2009); *Singh v. Wash.*
23 *Mut. Bank*, No. C-09-2771 MMC, 2009 U.S. Dist. LEXIS 73315, at *16 (N.D. Cal. Aug. 19,
24 2009). While courts interpret this requirement liberally, the plaintiff must at least show what the
25 plaintiff lost or how the plaintiff suffered actual harm. *McGill v. Wachovia Mortg., FSB Loan*,
26 2010 U.S. Dist. LEXIS 43393, 20-22 (E.D. Cal. Mar. 3, 2010), citing *Yulaeva v. Greenpoint*
27 *Mortgage Funding, Inc.*, No. CIV. S-09-1504 LKK, 2009 U.S. Dist. LEXIS 79094, at *44 (E.D.
28 Cal. Sept. 3, 2009); *Hutchinson v. Del. Sav. Bank*, FSB, 410 F. Supp. 2d 374, 383 (D.N.J. 2006).

Whether they are RESPA violations or not, Plaintiff did not suffer any harm as a result of not being made aware of the lender's intention to "split the Note and the Deed" and the purported fact that MERS is not registered with the California Department of Corporations. In *Benham v. Aurora Loan Servs.*, 2010 U.S. Dist. LEXIS 11189 (N.D. Cal. Feb. 9, 2010), the complaint was dismissed with prejudice because, among other things, the pleading did nothing to suggest that the plaintiff would not have suffered a foreclosure if MERS had been registered with the California Secretary of State, or had not participated in the transactions leading up to the foreclosure. The same is true here.

As for the allegation that MERS is not registered with the California Secretary of State, MERS has been the victim of identity theft. The "Mortgage Electronic Registration Systems, Inc." name was registered with California by an unrelated individual. It is the imposter-MERS which is listed as a suspended corporation by the California Secretary of State. See *Mortgage Electronic Registration Systems, Inc. v. Brosnan*, 2009 WL 3647125, (N.D. Cal. 2009).

In any event, MERS is not required to register with the California Secretary of State. MERS is a Delaware corporation (Undisputed Fact No. 16.) and is, therefore, as a foreign corporation in the State of California. See Cal. Corp. Code §§ 167, 171. A foreign corporation is required to obtain a certificate of qualification from the Secretary of State before it *transacts intrastate business*. (Cal. Corp. Code § 2105(a).) Intrastate business does not include "creating evidences of debt or mortgages, liens or security interests on real or personal property." Cal. Corp. Code § 191(c)(7). In addition, "[t]he ownership of any loans and the enforcement of any loans by trustee's sale, judicial process or deed in lieu of foreclosure or otherwise" are also exempted. Cal. Corp. Code § 191(d)(3).

MERS is not transacting intrastate business within the meaning of the statute. It performs only the exempted activities. Numerous courts, including this one, have recognized that MERS has standing in cases like this. See *Bogdan v. Countrywide Home Loans*, 2010 U.S. Dist. LEXIS 28889 (E.D. Cal. Mar. 25, 2010), citing *Swanson v. EMC Mortg. Corp.*, 2009 U.S. Dist. LEXIS 107912, 2009 WL 3627925, *9 (E.D. Cal. 2009) [MERS properly acted as a beneficiary under Corporations Code sections 191(c)(7) and (d)(3)]; *Lomboy v. SCME Mortg. Bankers*, 2009 U.S.

1 Dist. LEXIS 44158, 2009 WL 1457738, *3 (N.D. Cal. 2009) [same]; *Derakhshan v. Mortg. Elec.*
2 *Registration Sys.*, 2009 U.S. Dist. LEXIS 63176 (C.D. Cal. June 29, 2009) [MERS not required to
3 obtain a certificate of qualification from the Secretary of State because it was not transacting
4 intrastate business].

5 **2. “Predatory Lending”**

6 Defendants are unaware of any legally recognized claim called “predatory lending.”
7 Plaintiff does not provide any state or federal law that supports such a claim. There are no
8 statutes governing “predatory lending” separate and distinct from the specific claims already
9 brought by Plaintiff. See *Bojorquez v. Gutierrez*, 2010 U.S. Dist. LEXIS 28302 (N.D. Cal. Mar.
10 25, 2010). There is no common law cause of action for “predatory lending.” *Aguero v.*
11 *MortgageIT, Inc.*, 2009 U.S. Dist. LEXIS 75515 (E.D. Cal. Aug. 10, 2009).

12 Just as fundamentally, Plaintiff’s claim that Defendants engaged in “predatory lending” is
13 based upon the same factual allegations as Plaintiff’s other claims. As discussed above, all of
14 those claims are defective.

15 **L. There Was No Intentional Infliction Of Emotional Distress**

16 Plaintiff alleges a claim of intentional infliction of emotional distress.¹⁰ To plead a claim
17 for intentional infliction of emotional distress, Plaintiff must allege (1) extreme and outrageous
18 conduct by Defendants with the intention of causing, or reckless disregard of the probability of
19 causing, emotional distress; (2) Plaintiff’s suffering severe or extreme emotional distress; and (3)
20 actual and proximate causation of the emotional distress by Defendants’ outrageous conduct.
21 *Christensen v. Superior Court*, 54 Cal.3d 868, 903, (1991).

22 Conduct is only “extreme and outrageous” when it was “so extreme as to exceed all
23 bounds of that usually tolerated in a civilized community.” *Davidson v. City of Westminster*, 32
24 Cal.3d 197, 201 (1982) (citation omitted). For emotional distress to be severe, it must be “of
25 such substantial quantity or enduring quality that no reasonable man in a civilized society should
26 be expected to endure it.” (*Fletcher v. Western Nat’l Life Ins. Co.*, 10 Cal.App.3d 376, 397, 89
27

28 ¹⁰ First Amended Complaint, pp. 32:1-33:19.

1 Cal. Rptr. 78 (Ct. App. 1970).)

2 In *Ross v. Creel Printing & Publishing Co.*, 100 Cal.App.4th 736, 745 (2002), the court
3 observed that “[i]n the context of debt collection, courts have recognized that the attempted
4 collection of a debt by its very nature often causes the debtor to suffer emotional distress.” But
5 the court held that something more than mere debt collection must be alleged to sustain an
6 intentional infliction of emotional distress claim. *Id.* It is well-settled that something more than
7 normal debt collection practices that would rise to the level of “extreme and outrageous” conduct
8 is necessary to state a claim for intentional infliction of emotional distress. *Reynoso v. Paul Fin.,*
9 *LLC*, 2009 U.S. Dist. LEXIS 106555, 35-37 (N.D. Cal. Nov. 16, 2009), citing *Pineda v. Reyes*,
10 No. 09-1938, 2009 U.S. Dist. LEXIS 96853, *26-28 (S.D. Cal. Oct. 20, 2009) [dismissing
11 intentional infliction of emotional distress claim in wrongful foreclosure suit]; *Coyotzi v.*
12 *Countrywide Fin. Corp.*, No. 09-1036, 2009 U.S. Dist. LEXIS 91084, *27 (E.D. Cal. Sept. 16,
13 2009) [same].)

14 Defendants’ actions in foreclosing on the property cannot, as a matter of law, constitute
15 intentional infliction of emotional distress.

16 **M. Plaintiff Has No Right To Injunctive Relief**

17 Lastly, Plaintiff seeks injunctive relief to prevent foreclosure.¹¹ “Injunctive relief is a
18 remedy, not a cause of action.” *Guessous v. Chrome Hearts, LLC*, 179 Cal.App.4th 1177, 1187
19 (2009), citation omitted. Since injunctive relief is a remedy, a separate, valid cause of action
20 must exist before injunctive relief may be granted. (*Shell Oil Co. v. Richter*, 52 Cal.App.2d 164,
21 168 (1942); see also *McDowell v. Watson*, 59 Cal.App.4th 1155, 1159.) As shown above,
22 Plaintiff has no valid claims.

23 Furthermore, an injunction against the foreclosure action would be barred by the Anti-
24 Injunction Act, 28 U.S.C. § 2283 which provides:

25 A court of the United States may not grant an injunction to stay
26 proceedings in a State court except as expressly authorized by Act
27 of Congress, or where necessary in aid of its jurisdiction, or to
protect or effectuate its judgments.

28 ¹¹ First Amended Complaint, pp. 33:21-35:2.

1 In addition, the foreclosure process is complete. There are no acts to enjoin. A suit for
2 injunctive relief is normally moot upon the termination of the conduct at issue, unless there is a
3 likelihood of recurrence. *Demery v. Arpaio*, 378 F.3d 1020, 1026 (9th Cir.2004). Plaintiff's
4 claim is moot.

5
6 **IV. CONCLUSION**

7 SPS, MERS, and Deutsche Bank respectfully request that the Court grant summary
8 judgment against Plaintiff. In the alternative, they request that the Court dismiss those claims as
9 to which there are no genuine issue as to any material fact and to which they are entitled to
10 judgment as a matter of law.

11 Dated: August 19, 2010

12 CARR, McCLELLAN, INGERSOLL, THOMPSON & HORN
13 Professional Law Corporation

14
15 By: _____



Lori A. Lutzker

16 Attorneys for Defendants
17 Select Portfolio Servicing, Inc., Mortgage Electronic
18 Registration Systems, Inc., and Deutsche Bank National
19 Trust Co.
20
21
22
23
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25
26
27
28

EXHIBIT G

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES L. MACKLIN,

Plaintiff,

No. 2:10-cv-01097 FCD KJN PS

vs.

SELECT PORTFOLIO SERVICING,
et al.

Defendants.

ORDER

_____ /

In light of plaintiff's voluntary petition for bankruptcy, IT IS HEREBY
ORDERED that:

1. This action is STAYED effective immediately pursuant to 11 U.S.C. § 362.
The court must therefore defer further consideration of the matters pending in the instant case
until the bankruptcy action is terminated or the parties have obtained relief from the automatic
stay.

2. The hearing on defendants' motion for summary judgment and the status
conference set for October 7, 2010 at 10:00 a.m. are hereby VACATED.

////

////

////

3. The parties shall notify the court within ten (10) days of the resolution of the
bankruptcy proceedings.

IT IS SO ORDERED.

DATED: October 6, 2010



KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

EXHIBIT H

EXHIBIT H

FILED

APR 15 2014

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

JAMES MACKLIN
PO BOX 789
Crystal Bay, Nevada 89402
Telephone: (530) 888-9600
Fax: 530-888-9600
jimlmacklin@yahoo.com
IN PRO PER

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JAMES L. MACKLIN,
Plaintiff,

vs.

MATTHEW HOLLINGSWORTH, ET al.,
Defendant(s).

Case No: 2:10-cv-1097-FCD-KJN PS

**NOTICE OF MOTION AND MOTION
FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT AND
PROPOSED SECOND AMENDED
COMPLAINT**

Judge: Hon. Kendall J. Newman

TO THE COURT, PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that Plaintiff, James Macklin, individually, hereby gives Notice of Motion and Motions this court for leave to amend the Complaint in this case.

Pursuant to Federal Rules of Civil Procedure Rule 15 (a) (2), *Other Amendments*: In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

In its Order dated March 7th, 2014, the Court Ordered Plaintiff Macklin to file a motion for leave to file a second amended complaint along with a proposed second amended complaint. Plaintiff therefore submits this Motion and Second Amended Complaint pursuant to the Order.

1 The proposed amendment will add causes of action for: Breach of Contract, Truth In Lending
2 Act Violations, Cancellation of Instrument, Violation of Equal Credit Opportunity Act, Violation
3 of Fair Credit Reporting Act, California Business & Professions Code § 17200 and Illegal
4 Contract. This motion is brought on grounds that justice requires this second amendment and that
5 the proposed amendment will not prejudice Defendant, is timely, is not the result of bad faith or
6 dilatory motive, and the amendment is not futile. This motion is based on this Notice of Motion
7 and Motion, the Memorandum of Points and Authorities included below, the Declaration of
8 James Macklin, the pleadings and papers on file, both herein, and all pleadings, filed documents
9 and papers in the Eastern District Bankruptcy Court, Sacramento Division, Case No. 10-44610
10 (BR Dckt. No. 1 et. seq.) and upon such other matters as may be presented to the Court at the
11 time of the hearing.

12
13
14 Dated: Apr 11, 2014

James L. Macklin
James L. Macklin, Pro Per

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7 IN PRO PER

8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10
11
12
13 JAMES L. MACKLIN,

14 Plaintiff,

15 vs.

16 MATTHEW HOLLINGSWORTH, ET al.,

17 Defendant(s).

Case No: 2:10-cv-1097-FCD-KJN PS

18 MEMORANDUM OF POINTS AND
19 AUTHORITIES IN SUPPORT OF
20 MOTION FOR LEAVE TO FILE SECOND
21 AMENDED COMPLAINT

Judge: Hon. Kendall J. Newman

22 MEMORANDUM OF POINTS AND AUTHORITIES

23 Plaintiff filed this action in Placer County Superior Court, Defendants removed this
24 action based on 28 U.S.C. § 1331 and 28 U.S.C. § 1332. (Dckt. No. 2). After removal, Plaintiff
25 filed a First Amended Complaint. (Dckt. No. 13). The Action arises out of a controversy of
26 purported contract. Having requested of Defendants consent to amend the complaint, and having
27 been refused (See: Joint CMC Statement), Plaintiff now moves to file a Second Amended
28 Complaint to add additional parties, legal theories and causes of action, which have recently
come to light.

STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

Plaintiff commenced this action seeking damages against Defendants for wrongful conduct and acts that prejudiced Plaintiff. Plaintiff substantially relied, to his detriment, upon false representations made by Defendants. Plaintiff has recently discovered that additional Parties were complicit in these predicate acts and that these Parties have become necessary Parties that were previously unknown to Plaintiff through the deceitful and purposefully complex acts of Defendants and their cohorts. The newly added Defendants have made public admissions as to their illegal acts that were previously unavailable to Plaintiff.

LEGAL ARGUMENT

1. Federal Rules of Civil Procedure ("FRCP") Rule 20 (a)(2)(A) & (B) Permissive Joinder of Parties, (a) Persons who may be joined (2) Defendants: "Persons...may be joined in one action if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence or series of transactions or occurrences and; (B) any questions of fact or law common to all defendants will arise in the action."

FRCP Rule 60 (d): Other Powers to Grant Relief. This rule does not limit the court's power to: (1) entertain an independent action to relieve a party from a judgment, order or proceeding, (3) set aside a judgment for Fraud on the Court. Also see: FRCP Rule 15(c), Relation Back of Amendments.

2. Plaintiff signed for a debt obligation that named "Accredited Home Lenders, Inc." as a lender of funds. Plaintiff supplied Defendants Wells Fargo & Co's wholly owned subsidiary, Wells Fargo Home Mortgage ("WFHM"), and Deutsche Bank National Trust Co. as trustee for the Accredited Mortgage Loan Trust 2006-2 REMIC trust ("DBNTC") as purported successor in interest to Accredited Home Lenders, Inc., with his full employment and income history, including his U.S. Federal tax returns for the years 2005-2006. Defendants WFHM and DBNTC (as purported assignee) falsely placed an income onto Plaintiff's loan application that indicated income of \$370,000.00 per year. Plaintiff's U.S. tax returns (2005-2006) both showed Plaintiff's

1 income was only \$56,000.00 and \$86,000.00 per year respectively. Plaintiff was not aware of
2 this income falsification. Defendants were both aware, ratified the false information, but had a
3 duty to not extend the loan to Plaintiff under TILA §§§§ 1602(f), 1635(f), 1639(a)(1), 1639(h)
4 [prohibiting extensions of credit without regard to payment ability of consumer], 12 CFR
5 226.1(c), 226.2(a)(22)-2; and under Cal. Civ. Code § 1789.13 (d), (g) and (h).

6 3. California Civil Code § 1789.12 (a) "Credit services organization means a person who
7 sells, provides, or performs, or represents that he or she can or will sell, provide or perform, any
8 of the following services, in return for the payment of money or other valuable consideration":

9 (2) "Obtaining a loan or other extension of credit for a buyer". Defendant, Wells Fargo, is
10 governed by this section of the Code by offering to obtain a loan for Plaintiff Macklin.

11 4. Cal. Civ. Code § 1789.13: "A credit services organization and its salespersons, agents,
12 representatives, and independent contractors who sell or attempt to sell the services of a credit
13 services organization shall not do any of the following:

14 (d) Make ... a statement that is untrue or misleading and that is known, or that by the
15 exercise of reasonable care should be known, to be untrue or misleading, to a consumer credit
16 reporting agency or to a person who has extended credit to a buyer or to whom a buyer is
17 applying for an extension of credit, such as statements concerning a buyer's identification, home
18 address, creditworthiness, credit standing, or credit capacity;

19 (g) Make or use untrue or misleading representations in the offer or sale of the services of a
20 credit services organization, including either of the following:

21 (h) Engage, directly or indirectly, in an act, practice, or course of business that operates or
22 would operate as a fraud or deception upon a person in connection with the offer or sale of the
23 services of a credit services organization."
24

25 **DEFENDANT DEUTSCHE BANK, AS TRUSTEE, CARRIES FULL LIABILITY AS**
26 **PURPORTED ASSIGNEE**
27

1 5. Assignee liability is well settled law in California, when the assignee takes the benefit of a
2 contract, it also assumes all of the liabilities and the assignor stands only as a surety for the
3 performance of the obligation by the assignee. *Walker v. Phillips*, 205 Cal. App. 2d 26 (Cal.
4 App. 2d Dist. 1962). “Whatever conditions or limitations attached to the beneficiaries’ interest
5 prior to the assignment apply against the assignee”. *Gilberts’ Law Summary on Trusts*, 13th Ed.
6 § 442. The assignee then assumes rights to sue for damages against the assignor for the
7 repudiation or malfeasance. *Nashville Lodging Co. v. FDIC*, 934 F. Supp. 449 (D.D.C. 1996).

8 6. California Financial Code § 4973 governs “covered” consumer loans in California.
9 Plaintiff’s loan is a “covered loan” as defined by the Code.

10 7. California Financial Code § 4973 (f) (1): “A person who originates covered loans shall
11 not make or arrange a covered loan unless at the time the loan is consummated, the person
12 reasonably believes the consumer, or consumers, when considered collectively in the case of
13 multiple consumers, will be able to make the scheduled payments to repay the obligation based
14 upon a consideration of their current and expected income, current obligations, employment
15 status, and other financial resources, other than the consumer’s equity in the dwelling that secures
16 repayment of the loan....The consumer shall be presumed to be able to make the scheduled
17 payments to repay the obligation if, at the time the loan is consummated, the consumer’s total
18 monthly debts, including amounts owed under the loan, do not exceed 55 % of the consumer’s
19 monthly gross income, as verified by the credit application, the consumer’s financial statement, a
20 credit report, financial information provided to the person originating the loan by or on behalf of
21 the consumer, or any other reasonable means.” (Emph. mine). Plaintiff’s loan obligations alone
22 (\$2715.00/mo.[1st deed] + \$1196.00/mo. [2nd deed] = \$3911.00, or 55%) were known to
23 Defendants as they provided both loans simultaneously to Plaintiff. Those amounts exceeded the
24 percentages governed by the preceding Code requirements, *id.* Plaintiff’s **total monthly debts**
25 exceeded this statutory provision by more than 20%. It was a financial certainty, and statutory
26 violation, that the predatory, illegal loan would fail.

27 **PROPOSED DEFENDANT’S WELLS FARGO & CO. ADMISSIONS POST-**
28 **BANKRUPTCY AUTOMATIC STAY**

1 7. Defendants WFHM and DBNTC (as purported assignee) did use false information that
2 was knowingly and speciously placed on to Plaintiff's loan application by Defendant WFHM
3 and ratified by Defendant DBNTC's predecessor in interest in order to falsely qualify him for a
4 consumer loan transaction subject to this case. Proposed Defendant "WELLS" subsequently
5 admitted to identical abuses in the following Matter, Plaintiff asks this court to take judicial
6 notice (Fed. R. Evid., Rule 201) of the same Matter: **UNITED STATES OF AMERICA,**
7 **BEFORE THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,**
8 **WASHINGTON, D.C. In the Matter of: WELLS FARGO & COMPANY, San Francisco,**
9 **California and WELLS FARGO FINANCIAL, INC., Des Moines, Iowa. Docket Nos. 11-094-**
10 **B-HC1, 11-094-I-HC1, 11-094-B-HC2, 11-094-I-HC2, Order to Cease and Desist and Order**
11 **of Assessment of a Civil Money Penalty Issued Upon Consent.** This Order was issued on July
12 20th, 2011 and was signed by "Jennifer Johnson" (Bd. Of Governors, Fed. Res. System), "James
13 Strother" (Wells Fargo & Co.) and "Dean Anderson" (Wells Fargo Financial).

14 8. Wells Fargo & Co. and its subsidiary(ies) substantially admitted to the following, an
15 excerpt from the Consent Order: "Income Document Alteration or Falsification... internal
16 controls were not adequate to detect and prevent instances when certain of its sales personnel, in
17 order to meet sales performance standards and receive incentive compensation, altered or
18 falsified income documents and inflated prospective borrowers' incomes to qualify those
19 borrowers for loans that they would not otherwise have been qualified to receive."

20 9. The illegality of the transaction is central to Plaintiff's case. Proposed Defendant
21 Wells Fargo & Co. entered into such Consent Order after the time of the filing of this Complaint
22 in this court, and after the Bankruptcy Adversary Proceeding described herein. Plaintiff should
23 be entitled to add new Defendant Wells Fargo as a result of **newly admitted** acts that are directly
24 related to this case and which were not available at the time the case was filed. FRCP Rule 15 et.
25 seq. Courts are bound to apply a policy of great liberality in permitting amendments "at any
26 stage of the proceedings, up to and including trial," absent prejudice to the adverse party. See
27 *Atkinson v. Elk Corp.* 109 (2003) Cal.App. 4th 739, 761. Prejudice cannot result against
28

1 Defendant DBNTC as it substantially may rely upon the security of the real property barring a
2 negative trial result and has a right to an action against the assignor, *id.*, ¶ 5.

3 10. Plaintiff should be allowed to avoid the effect of earlier inaccurate or incomplete
4 pleadings, including proper parties, by including in the complaint a satisfactory explanation why
5 the earlier pleadings are incorrect. Absent such explanation, however, the self-destructive
6 allegations in the earlier pleading or discovery response are “read into” the complaint, and
7 allegations inconsistent therewith treated as sham and disregarded. See *Owens v. Kings*
8 *Supermarket* (1988) 198 Cal. App. 3d 379, 384. Plaintiff should be allowed to join Wells Fargo
9 because there may be a split of liability as to the false documents used by the defendants and the
10 court shall make such a determination based on all of the facts, not a convoluted version without
11 any prior notice of the Wells Fargo admissions.

12 11. Plaintiff was precluded from the requisite knowledge of the blatantly falsified
13 documents until discovery was sent in this case but, due to his filing of the bankruptcy, a
14 subsequent stay was placed on this case until recently, by Order of the court. Plaintiff received
15 only “blank” loan documents at closing of the transaction and received the overtly deceptive
16 versions of the falsified documents from Defendant DBNTC’s counsel literally days prior to the
17 bankruptcy being filed and staying this case.

18 ILLEGAL CONTRACT

19 12. Paragraphs 1-11 are incorporated as though fully stated herein.

20 13. As one authority has noted, “[t]he law has a long history of recognizing the general rule
21 that certain contracts, though properly entered into in all other respects, will not be enforced... if
22 found to be contrary to public policy.” (15 Corbin on Contracts (2003) § 79.1, p. 1 (Corbin); see
23 also *Wong v. Tenneco, Inc.* (1985) 39 Cal.3d 126, 135 [““No principle of law is better settled
24 than that a party to an illegal contract cannot come into a court of law and ask to have his illegal
25 objects carried out . . .””]; *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 150 [“the
26 courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks
27 compensation for an illegal act”]; Winfield, Public Policy in the English Common Law (1928)

42 Harv. L.Rev. 76.) Such agreements are “traditionally referred to as ‘illegal contracts,’” even though they “are functionally described as contracts unenforceable on grounds of public policy.” (Rest.3d Restitution & Unjust Enrichment (Tent. Draft No. 3, Mar. 22, 2004) § 32, com. a, p. 154 (Tentative Draft).)[5].

14. California statutes require that a contract have “a lawful object.” (Civ. Code, § 1550, subd. (3); see Civ. Code, § 1596.) Otherwise, the contract is void. (Civ. Code, § 1598.) Civil Code section 1668 provides that a contract that has as its object a violation of law is “against the policy of the law.” Civil Code section 1667 states that “unlawful” is “1. Contrary to an express provision of law; [¶] 2. Contrary to the policy of express law, though not expressly prohibited; or, [¶] 3. Otherwise, contrary to good morals.” (See also Civ. Code, §§ 1441 [“A condition in a contract, the fulfillment of which is . . . unlawful . . . is void”], 1608 [“If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void”].) California courts have stated that an illegal contract “may not serve as the foundation of any action, either in law or in equity” (*Tiedje v. Aluminum Taper Milling Co.* (1956) 46 Cal.2d 450, 453-454), and that when the illegality of the contract renders the bargain unenforceable, “[t]he court will leave them [the parties] where they were when the action was begun” (*Wells v. Comstock* (1956) 46 Cal.2d 528, 532; see also *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 408, disapproved on other grounds in *Bonifield v. County of Nevada* (2001) 94 Cal.App.4th 298 [“illegal contracts are void”]).

15. All Defendants were fully aware of the illegality of the contract by virtue of admissions made during discovery in this case just prior to the bankruptcy filing, which automatically stayed this case. Plaintiff’s exhibits within the adversary proceeding in the bankruptcy (Case No. 11-02024, Dckt. No. 308) as supplied by Defendant, DBNTC, show that the loan and its attendant documents (i.e., loan application, underwriting, income verification, tax returns, etc.) were materially falsified and ratified by Defendants, thus, illegally qualifying Plaintiff for a predatory loan.

16. The express prohibitions by law are codified at: California Financial Code § 4973 (f) (1); Cal. Civ. Code § 1789.13; California Civil Code § 1789.12, and TILA, *id.* Thus, **the contract is void**, not voidable, as an operation of law. The court in the bankruptcy lacked subject matter jurisdiction as to enforcing the terms of the contract by these strict prohibitions. Defendant(s) have admitted to the illegality of the contract, yet proceeded to enforce the illegal contract by means of enacting a Fraud upon the court through the use of recorded instruments that were *presumptively* true, based on the illegal contract's terms and conditions. California courts have stated that an illegal contract "may not serve as the foundation of any action, either in law or in equity" (*Tiedje v. Aluminum Taper Milling Co.* (1956) 46 Cal.2d 450, 453-454).

17. Plaintiff first learned of the falsity of the loan application through discovery in this case, but was precluded from bringing such evidence until this case was effectively re-activated by the Order in March, 2014. Justice demands that this court allow the amended Complaint to include the new Defendants Wells Fargo & Co. and the illegally substituted trustee, Quality Loan Services, Inc. See: *California Golf v. Cooper* (2008) 163 Cal. App. 4th 1053, 1070. "Whenever a court becomes aware that a contract is illegal, it has a duty to refrain from entertaining an action to enforce the contract". The bankruptcy court and this court have such a duty by the undisputed, un-refuted record (Dckt. No. 308, *id.*).

18. California law includes federal law. (*People ex rel. Happell v. Sischo* (1943) 23 Cal.2d 478, 491 [Federal law is "the supreme law of the land (U.S. Const., art. VI, sec. 2) to the same extent as though expressly written into every state law"]; 6A Corbin on Contracts, *supra*, § 1374, p. 7 ["Under our Constitution, national law is also the law of every separate State"].) Thus, a violation of federal law is a violation of law for purposes of determining whether or not a contract is unenforceable as contrary to the public policy of California. Truth In Lending Act ("TILA") §§§§ 1602(f), 1635(f), 1639(a)(1), 1639(h) [prohibiting extensions of credit without regard to payment ability of consumer], 12 CFR 226.1(c), 226.2(a)(22)-2; See: 15 U.S.C. § 1639c (a)(1) "**In General:** In accordance with regulations prescribed by the Bureau, no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is

1 consummated, the consumer has a reasonable ability to repay the loan, according to its terms,
2 and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.”

3 (3) “**Basis for determination:**

4 A determination under this subsection of a consumer’s ability to repay a residential mortgage
5 loan shall include *consideration* of the consumer’s credit history, current income, expected
6 income the consumer is reasonably assured of receiving, current obligations, debt-to-income
7 ratio or the residual income the consumer will have after paying non-mortgage debt and
8 mortgage-related obligations, employment status, and other financial resources other than the
9 consumer’s equity in the dwelling or real property that secures repayment of the loan. A creditor
10 shall determine the ability of the consumer to repay using a payment schedule that fully
11 amortizes the loan over the term of the loan”. Under the strict terms of Plaintiff’s loan, the loan
12 was due to re-set at an even higher monthly payment, thus, skyrocketing the 55% Debt-to-
13 Income ratio prohibition to over 75% of Plaintiff’s gross income, a material violation of the
14 lending laws herein. (See also Civ. Code, §§ 1441 [“A condition in a contract, the fulfillment of
15 which is . . . unlawful . . . is void”], 1608 [“If any part of a single *consideration* for one or more
16 objects, or of several considerations for a single object, is unlawful, the entire contract is void”]).

17 15 U.S.C. § 1639c (a) (4) **Income verification**

18 A creditor making a residential mortgage loan shall verify amounts of income or assets that
19 such creditor relies on to determine repayment ability, including expected income or assets, by
20 reviewing the consumer’s Internal Revenue Service Form W-2, tax returns, payroll receipts,
21 financial institution records, or other third-party documents that provide reasonably reliable
22 evidence of the consumer’s income or assets. In order to safeguard against fraudulent reporting,
23 any consideration of a consumer’s income history in making a determination under this
24 subsection shall include the verification of such income by the use of—

25 (A) Internal Revenue Service transcripts of tax returns; or

26 (B) a method that quickly and effectively verifies income documentation by a third party
27 subject to rules prescribed by the Bureau.
28

19. Based upon the foregoing authorities, the contract subject to this suit has been void by operation of law *ab initio*. The previous court in the bankruptcy lacked authority to make any final judgments under *Stern v. Marshall*, 131 S. Ct. 2594 (2011) and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co. (Marathon)*, 458 U.S. 50 (1982) as described and defined in Plaintiff's Joint CMC Statement. Therefore, any and all previous Orders, findings and Judgments are subject to this court's authority solely and may not be viewed as either authoritative or controlling.

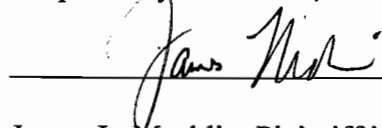
20. Plaintiff asks this court to allow amendment to include additional causes of action as defined herein, and to add Defendants Wells Fargo & Co. and Quality Loan Services, Inc. as parties necessary to join based on their conducts and admissions as fully described and admitted herein.

22. Plaintiff includes all of the exhibits admitted in the bankruptcy Adversary Proceeding No. 11-02024, Dckt. No. 308, which include: Falsified Loan Application (Ex. 14, Dckt. 308), Defendant's admitted evidence of "Full Doc" Loan, evidence of timely rescission by Plaintiff of illegal loan (Ex. 7, Dckt 308), U.S. Tax returns used to complete illegal contract loan application (Ex. 14, Dckt. 308), Note and Deed of Trust executed by Defendants used in qualifying illegal loan (Ex. 1 & 2, Dckt. 308), "wiring instructions" (Ex. 18, Dckt. 308) evidencing that named lender on the note and deed of trust never funded the predatory, illegal loan transaction.

CONCLUSION

Plaintiff has sufficiently shown cause for this Court to allow the Second Amended Complaint, attached hereto, to be considered by this Court. Plaintiff has adequately and timely followed the Court's Order in providing the "why and when" of necessary amendments in this case.

Respectfully Submitted,



Date: April 11th, 2014

James L. Macklin, Plaintiff in Pro Per.

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7 IN PRO PER

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES L. MACKLIN,
Plaintiff,

vs.

SELECT PORTFOLIO SERVICING, INC.,
WELLS FARGO & CO., QUALITY LOAN
SERVICES, INC., DEUTSCHE BANK
NATIONAL TRUST CO., AS TRUSTEE FOR
THE "ACCREDITED MORTGAGE LOAN
TRUST SERIES 2006-2" CERTIFICATE
HOLDERS, ET al.,
Defendant(s).

Case No: 2:10-cv-1097-FCD-KJN PS

**PLAINTIFF'S [PROPOSED] SECOND
AMENDED COMPLAINT FOR:**

**ILLEGAL CONTRACT,
BREACH OF CONTRACT,
VIOLATION OF TRUTH IN LENDING
ACT,
VIOLATION OF EQUAL CREDIT
OPPORTUNITY ACT,
VIOLATION OF FAIR CREDIT
REPORTING ACT,
VIOLATION OF CAL. BUSINESS &
PROFESSIONS CODE § 17200**

Judge: Hon. Kendall J. Newman

Comes now Plaintiff, James Macklin, and complains against Defendants named herein,
as follows:

VENUE AND JURISDICTION

1 This Court assumes original jurisdiction in the instant matter under 28 U.S.C. § 1332
2 which provides that:

- 3 (a) The district courts shall have original jurisdiction of all civil actions where the matter in
4 controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is
5 between (1) citizens of different States; (2) citizens of a State and citizens or subjects
6 of a foreign state; (3) citizens of different States and in which citizens or subjects of a
7 foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of
8 this title, as plaintiff and citizens of a State or of different States.

9
10 **PARTIES**

11 Defendant WELLS Fargo & Co. ("WELLS"), as the parent Company of Wells Fargo
12 Home Mortgage, maintains a business address at 420 Montgomery St., San Francisco, CA.,
13 94163. WELLS offers consumer loans, business banking services and standard banking services
14 to California residents at all times relevant hereto.

15 Defendant Quality Loan Service Corporation ("Quality") maintains an address of 2141
16 5th Ave, San Diego, CA., 92101. Quality is a privately held company offering comprehensive
17 trustee services to the wholesale lending and loan servicing industry. Quality was and is
18 operating under the laws of California at all times relevant hereto.

19 Defendant Deutsche Bank National Trust Co., as trustee for the Accredited Mortgage
20 Loan Trust 2006-2 ("DBNTC") maintains a business address at 1761 E. St. Andrews Place,
21 Santa Ana, Ca., 92705-4943. DBNTC is a private held company and specializes in trustee
22 services for the banking and loan servicing markets. DBNTC is and was operating under the laws
23 of California at all times relevant hereto.

24 Defendant, Select Portfolio Servicing, Inc. ("Select"), maintains its primary business
25 address in Salt Lake City, Utah. Select was formerly known as "Fairbanks Capital Corp." In
26 November 2003, Fairbanks Capital Corp. and Fairbanks Capital Holding Corp. agreed to pay \$40
27 million to settle with the FTC and the U.S. Department of Housing and Urban Development
28 (HUD), which charged them with engaging in a number of unfair, deceptive, and illegal practices

1 in the servicing of subprime mortgage loans. The Commission distributed the \$40 million as
2 redress to affected consumers. The settlement also imposed a number of specific limitations on
3 Fairbanks's ability to charge fees and engage in certain practices when servicing mortgage loans.
4 In early 2004, Fairbanks changed its name to Select Portfolio Servicing, Inc. and SPS Holding
5 Corp. Fairbanks changed its name to Select Portfolio Servicing effective June 30, 2004
6 according to its Articles of Amendment. In 2005, Select Portfolio Servicing was purchased by
7 Credit Suisse, a financial services company, headquartered in Zürich, Switzerland. According to
8 a Securities and Exchange Commission report (CFN: 1-6862) filed August 12, 2005, Credit
9 Suisse First Boston (USA), Inc. now known as Credit Suisse, purchased Select Portfolio
10 Servicing and its parent holding company for \$144.4 million. Credit Suisse's Investment Banking
11 Strategy included "the acquisition of Select Portfolio Servicing, a mortgage servicing company."
12 Select is registered to do business in California.

13 **FACTUAL BACKGROUND**

14 In January, 2006, Plaintiff was ordered by the family law court in Placer County to have
15 an evaluation of value of his residence for the purposes of a marital settlement in Plaintiff's
16 pending divorce.

17 Plaintiff went to his local business branch of Wells Fargo Bank, located in Loomis, Ca.
18 Plaintiff was advised to contact Wells Fargo's "Home Mortgage" division located in Roseville,
19 Ca. to complete the process of valuing his home and applying for a loan to settle the marriage
20 estate, which he did. Plaintiff was assigned to a "broker", Christine Medina, from the Roseville
21 office of WELLS. Plaintiff was required to provide WELLS with his financial statements for the
22 previous two (2) tax years, along with bank statements and U.S. tax returns. Plaintiff complied
23 with all required documents at the request of WELLS.

24 Plaintiff was then "telephone interviewed" as to his income, place of residence, time on
25 the job, and all manner of information as was asked of him during the interview. Plaintiff was
26 notified by telephone by agent Medina of WELLS that he was qualified for a loan that would
27 effectively "cash-out" newly acquired equity as a result of his residence being over-valued at by
28

1 WELLS. Plaintiff, due to the order of the family law court, complied with the court's order to re-
2 finance his home.

3 Plaintiff was asked by WELLS employee Medina to come to the Roseville office to sign
4 the loan papers. When Plaintiff arrived at the bank's closing offices, he was put into a small
5 cubicle room with a notary present for the signing. Plaintiff was never provided with any
6 contracts to review prior to the meeting. Plaintiff was advised by a "manager" of the office that
7 the notary was due to be in a signing in Folsom, Ca. within an hour and that this signing would
8 need to commence immediately with the assistance of pre-delegated "yellow tabs" to facilitate a
9 quick and efficient signing. Plaintiff was then guided through the signing and had completed the
10 signing of all necessary documents within a period of less than 15 minutes. Plaintiff was never
11 given the opportunity to review the documents and was sent home with no copies of the
12 documents.

13 Plaintiff was called later that week and told to come back the following week to pick up
14 the loan documents. Plaintiff did return the following week and picked up a large file folder that
15 contained the purported contract documents, however, Plaintiff later learned that documents
16 were blank and contained only miniscule information. Plaintiff was told by WELLS that this was
17 customary and not to worry because the originals were in the custody of a master document
18 custodian under bank policy.

19 Plaintiff made every installment payment due under the contract until August, 2008. This
20 was when Plaintiff had noticed that no principal was being paid down through his payments.
21 Plaintiff contacted the loan servicer and asked why this was. The loan servicer notified him that
22 the loan was an interest-only loan. Plaintiff was never told that his loan was interest-only and
23 was, in fact, told that the loan was a fully amortized, standard performing "principal and interest"
24 loan by WELLS employee Medina.

25 Plaintiff executed a dispute in writing to the loan servicer challenging the validity of the
26 loan. Plaintiff was then contacted by counsel for the "beneficiary", Law offices of "Ronald
27 Roup". Plaintiff subsequently rescinded the loan timely and in writing to the Law offices of
28

1 Ronald Roup. Mr. Roup's office replied with a letter indicating that the loan was not rescinded,
2 by offering legal advice to Plaintiff through a writing (See: Dckt. 308, Bkr. Case No. 11-02024,
3 In Re Macklin, "rescission letter").

4 In May, 2010, Plaintiff had the instant matter removed to this court's jurisdiction from
5 the Placer County Superior Court. Plaintiff entered a First Amended Complaint which was a
6 dense, 127 page diatribe crafted by Plaintiff without any experience or training. Plaintiff admits
7 that the pleading was inadequate and did not offer this court any means of deciphering plausible
8 claims or causes of action.

9 Plaintiff subsequently filed a bankruptcy on September 16th, 2010. The case was filed by
10 Plaintiff just days after receiving voluminous documents from Defendant's counsel which
11 Plaintiff could not reasonably or timely extract any meaningful claims or causes that would allow
12 him to offer this court a revised or amended complaint.

13 Plaintiff filed an adversary proceeding in the bankruptcy on January 13th, 2011. The case
14 was prosecuted by a series of counsel on behalf of plaintiff, who could not, or would not,
15 properly represent Plaintiff's interests. All three counselors were admonished by the court that
16 their pleadings and papers were, at some point...deficient. So deficient, in the case of the Motion
17 for Summary Judgment filed by Plaintiff's counsel, Daniel Hanecak, that the court quantified the
18 motion as "one of the most anemic in all my years on the bench".

19 Because the bankruptcy court does not have the authority granted by Congress to issue
20 final judgments (See: *Stern v. Marshall*, 131 S. Ct. 2594 (2011) and *Northern Pipeline*
21 *Construction Co. v. Marathon Pipe Line Co.* (Marathon), 458 U.S. 50 (1982), Plaintiff now may
22 fully and lawfully complete the original Complaint filed in the Superior Court in Placer County
23 back in 2010.

24 At the time of the original complaint filed by Plaintiff, there was no possible way of
25 Plaintiff having knowledge of certain causes of action that are included in this second amended
26 complaint. For example, the admissions made by Proposed Defendant, WELLS, were not
27
28

1 available to Plaintiff until the time of the Consent Order issued in the Matter on July 20th, 2011
2 (See: MPA in support of the Motion for Leave to Amend, ¶ 7).

3 Plaintiff also points to the discovery items that were sent to him just days prior to the
4 bankruptcy being filed. This discovery included admissions made by the Defendants WELLS
5 and DBNTC wherein the falsified income information was inserted by Defendant WELLS and
6 ratified by Defendant DBNTC as the successor-in-interest to Accredited Home Lenders, the
7 same company that is named as the REMIC Trust beneficiary (Accredited Mortgage Loan Trust
8 2006-2, Deutsche Bank National Trust Co., as trustee).

9 Because Plaintiff sufficiently alleges that DBNTC carries full liability as purported
10 assignee, DBNTC stands as the proper Defendant here (See: Plaintiff's Memorandum of Points
11 & Authorities, ¶ 5). Plaintiff, however, does not admit that the debt obligation is valid and does
12 not admit that DBNTC ever properly or timely was conveyed any interest in Plaintiff's purported
13 obligation.

14 **FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

15
16 1. Defendants, and each of them together, have all engaged in practices that are
17 against public policy in California.

18 2. Defendant WELLS has admitted to falsifying income requirements and other
19 various items necessary in order to lawfully qualify a consumer for a loan. This admission came
20 two years after Plaintiff commenced this action at Placer County Superior Court. WELLS did
21 admit to: "Income Document Alteration or Falsification... internal controls were not adequate to
22 detect and prevent instances when certain of its sales personnel, in order to meet sales
23 performance standards and receive incentive compensation, altered or falsified income
24 documents and inflated prospective borrowers' incomes to qualify those borrowers for loans that
25 they would not otherwise have been qualified to receive." (See: Plaintiff's Memorandum of
26 Points and Authorities in support of Motion for Leave to Second Amended Complaint and
27 request for judicial notice of the matter).

1 3. Defendant WELLS acted as a "Credit Service Organization" under California
2 Civil Code § 1789.12 (a): "Credit services organization means a person who sells, provides, or
3 performs, or represents that he or she can or will sell, provide or perform, any of the following
4 services, in return for the payment of money or other valuable consideration":

5 4. (2) "Obtaining a loan or other extension of credit for a buyer". Defendant,
6 Wells Fargo, is governed by this section of the Code by offering to obtain a loan for Plaintiff
7 Macklin.

8 5. Cal. Civ. Code § 1789.13: "A credit services organization and its salespersons,
9 agents, representatives, and independent contractors who sell or attempt to sell the services of a
10 credit services organization shall not do any of the following:

11 (d) Make ... a statement that is untrue or misleading and that is known, or
12 that by the exercise of reasonable care should be known, to be untrue or
13 misleading, to a consumer credit reporting agency or to a person who has
14 extended credit to a buyer or to whom a buyer is applying for an extension of
15 credit, such as statements concerning a buyer's identification, home address,
16 creditworthiness, credit standing, or credit capacity;

17 (g) Make or use untrue or misleading representations in the offer or sale of
18 the services of a credit services organization, including either of the following:
19

20 (h) Engage, directly or indirectly, in an act, practice, or course of business
21 that operates or would operate as a fraud or deception upon a person in
22 connection with the offer or sale of the services of a credit services
23 organization."

24 6. Defendant WELLS had a duty to not falsify or offer false or deceptive
25 information as it relates Plaintiff's loan application. Plaintiff materially relied on WELLS to his
26 detriment and has subsequently lost possession of his home as a result of WELLS' false and
27 deceptive business practices when employees of WELLS placed false income information on to
28 Plaintiff's loan application documents. The false information included, but was not limited to:

1 the amount of income Plaintiff actually earned for the years 2005-2006, the amount of time
2 Plaintiff actually lived in the subject property, the amount of time Plaintiff was employed in his
3 field of employment, the actual value of the subject property. All of these falsifications were
4 done by Defendant WELLS in order to wrongfully “qualify” him for a loan that was statutorily
5 prohibited. See also: Truth In Lending (TILA) 15 U.S.C. § 1639c (a) (4) Income verification:

6 *“A creditor making a residential mortgage loan shall verify amounts of*
7 *income or assets that such creditor relies on to determine repayment ability,*
8 *including expected income or assets, by reviewing the consumer’s Internal*
9 *Revenue Service Form W-2, tax returns, payroll receipts, financial institution*
10 *records, or other third-party documents that provide reasonably reliable*
11 *evidence of the consumer’s income or assets. In order to safeguard against*
12 *fraudulent reporting, any consideration of a consumer’s income history in*
13 *making a determination under this subsection shall include the verification of*
14 *such income by the use of—*

15 *(A) Internal Revenue Service transcripts of tax returns; or*

16 *(B) a method that quickly and effectively verifies income documentation by a*
17 *third party subject to rules prescribed by the Bureau.”*
18

19 7. Defendant DBNTC, as purported assignee¹ of the predatory loan contract, ratified
20 the actions of Defendant WELLS. DBNTC had a duty to reject the falsified loan application
21 under 15 U.S.C. § 1639c (a) (4) Income verification, *id.*

22 8. Defendant DBNTC carries all benefits and liabilities under the false loan as if
23 they were the originator of the loan. This premise is well settled law in California.
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28 ¹. Gilberts’ Law Summary on Trusts, 13th Ed. § 442. “Whatever conditions or limitations attached to the
beneficiaries’ interest prior to the assignment apply against the assignee.”

1 9. The loan contract is governed by the Uniform Commercial Code, or the California
2 Commercial Code as adopted by California's legislature. The specific Article that governs the
3 subject transaction is Article 9 of the Code, *id.*

4 10. Under Plaintiff's promissory note at section 5, "Borrower's Right to Pay", the
5 contract states that the borrower has "...the right to make payments of principal at any time
6 before they are due. A payment of principal only is known as a 'prepayment.' *When I make a*
7 *prepayment, I will tell the Note Holder in writing that I am doing so.*" The Italicized sentence of
8 this Section constitutes an undertaking to do an act in addition to the payment of money. Under
9 3-104(a)(3) of the UCC, a promissory note **cannot be an instrument** if it contains such an
10 undertaking; the rules of negotiability apply only to promises to pay money, not to other, non-
11 monetary understandings. Sending a notice is an act "in addition to the payment of money," and
12 the note's language clearly constitutes an "undertaking" to perform that act. Thus, the instrument
13 is not negotiable and the rules of Article 3 of the UCC (including the holder-in-due-course
14 protections) do not apply. See: UCC § 9-109(a)(3) states that Article 9 applies to any sale of a
15 "promissory note," which is defined in § 9-102(a)(65) as "an instrument that evidences a promise
16 to pay a monetary obligation, [or] does not evidence an order to pay . .".

17 11. Plaintiff loan, as an asset, must have conveyed to the Accredited Mortgage Loan
18 Trust 2006-2 Trust ("AMLT") under the "Law of Assignments". The Pooling and Servicing
19 Agreement ("PSA") terms trump the normal Article 3 and 9 Rules as an "otherwise agreed
20 provision" under 1-302 of the UCC and therefore the notes in a securitized trust are transferred
21 by assignment and by Negotiation. Section 1-302(a) of the UCC states that "*except as otherwise*
22 *provided in subsection (b) or elsewhere in (the Uniform Commercial Code), the effect of the*
23 *provisions of (the Uniform Commercial Code) may be varied by agreement.*" Sub-Section (b) of
24 Section 1-302 then states that the "*obligations of good faith, diligence, reasonableness, and care*
25 *prescribed (the Uniform Commercial Code) may not be disclaimed by agreement. The parties, by*
26 *agreement, may determine the standard by which the performance of those obligations is*
27 *measured if those standards are not manifestly unreasonable. Whenever (the Uniform*
28 *Commercial Code) requires an action to be taken within a reasonable time, a time that is not*

1 *manifestly unreasonable may be fixed by the agreement.*” Finally, 1-302(c) provides that “*the*
2 *presence in certain provisions of (the Uniform Commercial Code) of the phrase ‘unless*
3 *otherwise agreed’, or words of similar import, does not imply that the effect of the other*
4 *provisions may not be varied by agreement under this section.*” The Comments to 1-302 provide
5 among other things that this Section “*addresses the effectiveness of contractual provisions that*
6 *select an exclusive or a non-exclusive form of transfers and negotiation of instruments.*” Also,
7 these Comments make it clear that the parties by agreement may not make an instrument
8 “negotiable” unless it otherwise complies with Section 3-104 of the UCC. Similarly, the
9 Comments state that the parties by agreement may not avoid the applications of UCC Article 9 to
10 a transaction that falls within its scope (See Comments to 9-109). And, the Assignment Rules are
11 set and structured by the PSA and the collateral Mortgage Loan Sales Agreements as the same
12 relate to the PSA.

13 12. Defendant DBNTC was precluded from receiving Plaintiff’s debt obligation as a
14 matter of law under Internal Revenue Code § 860 D, F & G. Because the loan is an “impaired
15 asset”, due to the false means by which it was obtained, DBNTC cannot, and has not ever, shown
16 that it lawfully acquired the debt obligation. DBNTC made an election to a specific tax treatment
17 under the laws of the Real Estate Mortgage Investment Conduit (“REMIC”) at I.R.C. Rule 860
18 et. seq. This decision was made prior to Plaintiff ever signing for the fatally defective loan.

19 13. The tax definition of ownership, and thus standing, applies to mortgage notes
20 claimed as assets of the subject REMIC trust².

21 14. Assuming arguendo that the loan was not falsified, which Plaintiff specifically
22 states that it was, Plaintiff’s loan, as an asset of the AMLT 2006-2 trust, must also have
23 conveyed into the trust on or before the trusts’ closing date, June 1st, 2006. See: I.R.C. Rule
24 860D(a)(4), the asset must be lawfully conveyed within 90 days of the closing date or it is a
25 prohibited transaction. Defendant DBNTC has offered an assignment, dated in 2009, that
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27
28 ² Bradley T. Borden & David J. Reiss, Beneficial Ownership and the REMIC Classification Rules, 28 TAX
MGMT. REAL EST. J. 274 (Nov. 7, 2012).

1 purports to act as the conveyance into the *closed* AMLT 2006-2 Trust. Under the Statute of
2 Frauds, this conveyance works as the sole writing that attempts to convey an interest in real
3 property to DBNTC, as trustee for the AMLT 2006-2 trust. This obvious deception is a fraud on
4 its face under the law of the REMIC trust. See: case No. 11-02024, Dckt. No. 308; "Assignment
5 of Deed of Trust".

6 15. Plaintiff alleges that he is, in fact, a party to the AMLT Pooling & Servicing
7 Agreement, if the REMIC Trust ever lawfully held the subject loan as an asset. Plaintiff alleges
8 that Defendant DBNTC and WELLS entered into agreements (PSA, Master Sales and Servicing
9 Agreement) prior to Plaintiff's contract, that substantially relied on Plaintiff's, and others
10 similarly situated, payment stream in order to receive the benefit of zero (0) % tax rates on the
11 income received from the Plaintiff's loan obligation by the REMIC Trust. Plaintiff alleges that
12 the "Step Transaction Doctrine" applies in this case³, which, as a result of the several
13 transactions being treated as one under the Doctrine, Plaintiff is an intended party to the
14 transaction (PSA).

15 16. Plaintiff alleges that the transactions, together, meet with a minimum of at least
16 one of the three (3) tests under the Doctrine, i.e.; (1) the binding commitment test, (2) the
17 interdependence test, or, (3) the end results test.

18 FIRST CAUSE OF ACTION: ILLEGAL CONTRACT

19
20 17. Plaintiff re-alleges and incorporates by reference all sections of the foregoing
21 Complaint.

22 18. California statutes require that a contract have "a lawful object." (Civ. Code, §
23 1550, subd. (3); see Civ. Code, § 1596.) Otherwise the contract is void. (Civ. Code, § 1598.).
24 Plaintiff alleges that Defendants have all unlawfully exercised rights which did not accrue under

25
26 ³ The step transaction doctrine originated from a common law principle in *Gregory v. Helvering*, 293 U.S. 465
27 (1935) that allowed the court to re-characterize a tax-motivated transaction.; "As early as 1938, the United States
28 Supreme Court has indicated that "a given result at the end of a straight path is not made a different result because
reached by following a devious path." *Commissioner v. Clark*, 489 U.S. 726, 738 (1989).; (*Shuwa Investments Corp.*
v. County of Los Angeles (1991) 1 Cal.App.4th 1635, 1648-1649. *Shuwa*, supra, at p. 1648.; *McMillin-
BCED/Miramar Ranch North v. County of San Diego* (1995) 31 Cal.App.4th 545, 556.)

1 the unlawful contract herein (the consumer loan contract consisting of all attendant documents,
2 including the loan application, underwriting transmittal, Promissory Note, Deed of Trust, Notice
3 of Default, Substitution of Trustee, Assignment of Deed of Trust).

4 19. Plaintiff alleges that the consumer finance contract complained of herein is void.

5 20. Plaintiff alleges that Defendants acquired the contract complained of herein by
6 use of deceptive and false means. Those false means are: Defendant WELLS wrote false
7 information into Plaintiff's loan application as a consideration for a consumer loan, Defendant
8 DBNTC, as purported assignee of the false loan, ratified the false acts of WELLS where they had
9 a duty to refrain from executing a loan in favor of Plaintiff, Defendant Quality acted in concert
10 with Defendant DBNTC as an agent to falsely make a declaration of a default where none
11 existed, Defendant Select, as purported loan servicer, gave directions to Defendant Quality to
12 deliver and record an acceleration of debt where no default existed and while relying upon the
13 void contract. Defendants then took Plaintiff's home by way of non-judicial foreclosure while
14 falsely invoking California Civil Code § 2924.

15 21. Cal. Civil Code § 1668 provides that a contract that has as its object a violation of
16 law is "against the policy of the law." Civil Code § 1667 states that "unlawful" is "1. *Contrary*
17 *to an express provision of law; [¶] 2. Contrary to the policy of express law, though not*
18 *expressly prohibited; or, [¶] 3. Otherwise contrary to good morals."* (See also Civ. Code, §§
19 1441 ["A condition in a contract, the fulfillment of which is . . . unlawful . . . is void"], 1608 ["If
20 any part of a single consideration for one or more objects, or of several considerations for a
21 single object, is unlawful, the entire contract is void"].) Plaintiff alleges that his income is a
22 **consideration** of the formation of the contract (See below: ¶¶24, 25), as is his time of residence
23 at his existing home at the time of the application being falsified by Defendant(s). Plaintiff
24 alleges that Defendant WELLS materially violated the legislative intent of the above statutes to
25 the detriment of Plaintiff. Plaintiff substantially relied on Defendants' acts and omissions, as do
26 others in California.

1 22. Plaintiff alleges that an unlawful contract cannot form the basis of any action, at
2 law or in equity. Plaintiff alleges that Defendants, and all of them, used an illegal contract to
3 dispossess Plaintiff of his home, as considered as unique and irreplaceable.

4 23. Plaintiff alleges that the term “legislation” as including “any fixed text enacted by
5 a body with authority to promulgate rules, including not only statutes, but constitutions and local
6 ordinances, as well as administrative regulations issued pursuant to them.” (Rest.2d Contracts,
7 supra, § 178, com. a, p. 7.)[7]. Plaintiff alleges that Defendants, and all of them, have violated
8 the legislative intent of: Civ. Code, § 1550, subd. (3), Civ. Code, § 1596 Civ. Code, § 1596, Civ.
9 Code, § 1598, Civil Code § 1668, Civil Code § 1667. Plaintiff alleges that Defendants had a duty
10 to Plaintiff to act within the legislative scope of those statutes and to refrain from harming
11 Plaintiff and his rights under such Codes. Plaintiff alleges that Defendants were fully aware of
12 the actions that were taken by each of them while playing their roles in dispossessing Plaintiff of
13 his property through the use of an illegal contract.

14 24. 15 U.S.C. § 1639c (a)(1) “In General: In accordance with regulations prescribed
15 by the Bureau, no creditor may make a residential mortgage loan unless the creditor makes a
16 reasonable and good faith determination based on verified and documented information that, at
17 the time the loan is consummated, the consumer has a reasonable ability to repay the loan,
18 according to its terms, and all applicable taxes, insurance (including mortgage guarantee
19 insurance), and assessments.” (3) “Basis for determination:

20 25. A determination under this subsection, *id.*, of a consumer’s ability to repay a
21 residential mortgage loan shall include **consideration** of the consumer’s credit history, current
22 income, expected income the consumer is reasonably assured of receiving, current obligations,
23 debt-to-income ratio or the residual income the consumer will have after paying non-mortgage
24 debt and mortgage-related obligations, employment status, and other financial resources other
25 than the consumer’s equity in the dwelling or real property that secures repayment of the loan.

26 26. Plaintiff alleges that Defendants have violated federal law and that a violation of
27 those laws is a violation of state law (U.S. Constitution, Article VI, sec. 2: the supreme law of
28

1 the land). Plaintiff alleges that Defendants, and all of them, have violated public policy in
2 exercising a void contract against Plaintiff and attempting to have a court enforce a knowingly
3 false, illegal and void contract.

4 27. Plaintiff and others similarly situated have been, and will be, harmed as a direct
5 result of the proximate acts and omissions of Defendants unless this court intervenes.

6 **SECOND CAUSE OF ACTION: BREACH OF CONTRACT**

7
8 28. Plaintiff re-alleges and incorporates by reference all sections of the foregoing
9 Complaint.

10 29. Fed. R. Civ. Proc. 8(e)(2) permits the use of alternate or hypothetical pleading if:
11 i. by the nature of the circumstances the Plaintiff would not know which allegations are right.

12 30. Plaintiff alleges that there is a possible contract relationship between Plaintiff and
13 Defendants, if found to be a valid contract. Plaintiff does not admit as to the veracity or legality
14 of the contract, however, Plaintiff pleads in the alternative to such a finding.

15 31. Plaintiff alleges that Defendant, and or its agents, elected to record, or caused to
16 be recorded, a deed of trust, a substitution of trustee, an assignment of deed of trust and a Notice
17 of Default against Plaintiffs' interest in his property. While recorded instruments are presumed
18 valid, the mere act of recordation does not authenticate its validity, rather, evidence to support
19 such instrument is required. See: Cal. Evid. Code §1271, requiring a Declaration establishing the
20 sources of information and the manner and time of preparation were such as to indicate
21 trustworthiness; Code of Civ. Procedure §437c, subd. (d), where a supporting Declaration must
22 be made on personal knowledge and "show affirmatively that the affiant is competent to testify
23 to the matters stated therein".

24 32. Plaintiff alleges that he has lost, or risks losing permanently, contract rights in
25 both a deed of trust and a note that were unlawfully conveyed because of the acts of Defendants.
26 Plaintiff also alleges that as a direct and proximate result of Defendant's acts, omissions and
27
28

1 false statements made in the false instrument, that his ability to obtain credit and/or to maintain
2 credit has been damaged by Defendant.

3 33. Plaintiff alleges that at sec. 22 of Plaintiff's deed of trust, it states that the party
4 who executes a Notice of Default has a duty first to notice borrower of their right to "an action to
5 assert the non-existence of a default". This notice is a contractual provision and must be afforded
6 to borrower thirty (30) days prior to the acceleration and notice of default. Plaintiff alleges that
7 Defendants failed to strictly adhere to the contractual provision herein and has harmed Plaintiff
8 as a direct result of such a material breach of the contract. Such a breach precludes Defendants
9 from invoking the statute at sec. 2924 of the Cal. Civil Code.

10 34. Plaintiff alleges that no thirty (30) day notice was given to Plaintiff and that
11 Defendant did not timely, or ever, send notice to Plaintiff of a right to an action as described in
12 ¶32. Plaintiff is exercising his contractual right to assert the non-existence of the default
13 described and defined in the false instrument.

14 35. Plaintiff alleges that the breach by Defendant(s), described in ¶33, entitles
15 Plaintiff to relief from any action arising from such a breach, judicial or non-judicial.

16 36. Plaintiff alleges that this breach also violates Plaintiff's rights under Cal. Civ.
17 Code §2924. Defendant is first bound to abide by the contract rights of Plaintiff prior to invoking
18 the statute. Defendant did not strictly comply with Plaintiff's contract rights and was therefore,
19 as a condition precedent, prohibited from invoking the non-judicial foreclosure statute in
20 California, *id.* See: Doctrine of First Material Breach.

21 37. Plaintiff alleges that he has been damaged in an amount to be determined at the
22 time of trial.

23
24 **THIRD CAUSE OF ACTION: VIOLATION OF EQUAL CREDIT**
25 **OPPORTUNITY ACT, 15 U.S.C. §1691(d)(2)**

26 38. Plaintiff re-alleges and incorporates by reference all sections of the foregoing
27 Complaint.
28

1 39. The Equal Credit Opportunity Act (“ECOA”) was intended to protect persons
2 from creditor trespasses against their ability to obtain, or maintain, fair credit. Plaintiff alleges
3 that Defendants are subject to the Act.

4 40. The ECOA, codified at: 15 U.S.C. §1691(d)(2), defines an adverse action as a
5 “denial or revocation of credit, a change in the terms of an existing arrangement, or a refusal to
6 grant credit in substantially the amount or on substantially the terms requested.” 15 U.S.C.
7 §1691e, of the same Act, states that “any creditor who fails to comply with any requirement
8 imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages
9 sustained by such applicant”. Plaintiff alleges that damages have resulted from Defendants acts
10 against his rights which amount to a taking of Plaintiff’s property, valued at \$689,000.00 at the
11 time of the taking by Defendants.

12 41. Plaintiff alleges that all Defendants acted in concert together as agents, employees
13 and affiliates of one another.

14 42. Plaintiff alleges that Defendants, and their agents, substantially and materially
15 violated Plaintiff’s rights under the ECOA by revoking and changing the terms of an existing
16 credit arrangement without cause. Defendants did execute and perform these illegal and
17 oppressive acts with full knowledge and Notice from Plaintiff that those acts were without
18 authority and were based on false or baseless information from a party other than the true
19 beneficiary of the contract, if such a contract is found to be enforceable.

20 43. Plaintiff alleges that Defendant, and its agents, materially breached the ECOA by
21 failing to give Plaintiff thirty (30) days’ notice of an adverse action, as required under the Act,
22 prior to executing and recording a notice of default, which was the acceleration of the debt.

23 44. Plaintiff alleges that he has been damaged financially, emotionally and physically
24 by the Defendant(s) as a direct and proximate result of Defendant’s actions and/or in-actions,
25 material misrepresentations with malice and material omissions.

26 45. Plaintiff alleges that a “default”, as described in the Notice of Default, was never
27 declared by any beneficiary and is not a material breach of the contract. Defendants have never
28

1 evidenced or supported their Notice of Default with any form of accounting or Declaration, as
2 made by the purported beneficiary, the "AMLT 2006-2 Trust". Plaintiff alleges that Defendants,
3 and all of them, falsified the Notice of Default by inserting language that, while following most
4 of the required language for such a notice, may be refuted by Plaintiff. Plaintiff hereby refutes
5 every statement made in the Notice of Default as being false and without any foundation
6 whatsoever. Plaintiff alleges that the loan obligation was performing per contract terms at the
7 time that the Notice of Default was executed by Defendant Quality at the request of Defendant
8 Select. Defendant DBNTC, as purported beneficiary never ratified or authorized Select to
9 execute the Notice.

10 46. Plaintiff alleges that there was never a default as was defined and described in the
11 false Notice of Default. Plaintiff has a duty to defend title against all others as defined in the
12 deed of trust.

13 **FOURTH CAUSE OF ACTION: VIOLATION OF THE FAIR CREDIT**
14 **REPORTING ACT**

15 47. Plaintiff re-alleges and incorporates by reference all sections of the foregoing
16 Complaint.

17 48. Pursuant to 15 USC §1681 (s) (2) (b), Plaintiff is entitled to maintain a private
18 cause of action against Defendant for an award of damages in an amount to be proven at the time
19 of trial for all violations of the Fair Credit Reporting Act ("FCRA") which caused actual
20 damages to Plaintiff, including emotional distress and humiliation.

21 49. Plaintiff alleges that Defendants are all subject to the Act as defined above, *id.*

22 50. Plaintiff is entitled to recover damages from Defendant for negligent non-
23 compliance with the Fair Credit Reporting Act pursuant to 15 USC§1681 (n) (a) (2) in an amount
24 to be proven at the time of trial.

25 51. Plaintiff alleges that Defendant breached its duty under the statute, *id.*, and elected
26 to ignore Plaintiff's warning about the false information contained in the Notice of Default
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1 instrument because the Defendant DBNTC receives payments from a third party loan servicer,
2 Select, to execute this, and tens of thousands exactly like this, false instrument. Once put on
3 notice by Plaintiff, Defendant speciously ignored its equal contractual duty to Plaintiff and its
4 statutory duties to further its own economic interests at the peril and expense of plaintiff.

5 52. Plaintiff has been harmed as a direct and proximate result of Defendant's
6 disregard for his contract rights in an amount to be determined at trial. These damages consist of
7 emotional, financial, contractual and his ability to maintain or acquire reasonable credit through
8 a standardized credit score, as reported by the three major credit reporting agencies ("CRA's").

9 53. Plaintiff is entitled to relief under FCRA. Plaintiff requests leave of court to
10 amend this action upon further discovery.

11 **FIFTH CAUSE OF ACTION: VIOLATION OF TRUTH IN LENDING ACT**

12
13 54. Plaintiff re-alleges and incorporates by reference all sections of the foregoing
14 Complaint.

15 55. Plaintiff alleges that Defendants are subject to the Truth in Lending Act ("TILA")
16 at 15 U.S.C. § 1639c (a) (4) Income verification.

17 56. Plaintiff alleges that the time for an action began to toll upon his discovery of
18 material violations made by Defendants because those predicate acts were not discovered until
19 discovery was received by Plaintiff in this case in September, 2010. The falsified documents
20 were only discovered in November, 2010, by Plaintiff while examining the discovery. Plaintiff
21 had already stayed this case as a result of the bankruptcy filing in September, 2010. Plaintiff had
22 no reasonable means of discovering these violations until the case was stayed, thus, the statute
23 tolls.

24 57. Plaintiff now brings this action timely and as a matter of federal law.

25 58. Defendants WELLS and DBNTC, as successor in interest to the original "lender",
26 Accredited Home Lenders, Inc., had separate duties under this Act.
27
28

1 59. 15 U.S.C. § 1639c (a)(1) “In General: In accordance with regulations prescribed
2 by the Bureau, no creditor may make a residential mortgage loan unless the creditor makes a
3 reasonable and good faith determination based on verified and documented information that, at
4 the time the loan is consummated, the consumer has a reasonable ability to repay the loan,
5 according to its terms, and all applicable taxes, insurance (including mortgage guarantee
6 insurance), and assessments.” (3) “*Basis for determination:*

7 *A determination under this subsection of a consumer’s ability to repay a*
8 *residential mortgage loan shall include consideration of the consumer’s credit*
9 *history, current income, expected income the consumer is reasonably assured of*
10 *receiving, current obligations, debt-to-income ratio or the residual income the*
11 *consumer will have after paying non-mortgage debt and mortgage-related*
12 *obligations, employment status, and other financial resources other than the*
13 *consumer’s equity in the dwelling or real property that secures repayment of the*
14 *loan. A creditor shall determine the ability of the consumer to repay using a*
15 *payment schedule that fully amortizes the loan over the term of the loan”. Under*
16 *the strict terms of Plaintiff’s loan, the loan was due to re-set at an even higher*
17 *monthly payment, thus, skyrocketing the 55% Debt-to-Income ratio prohibition to*
18 *over 75% of Plaintiff’s gross income, a material violation of the lending laws*
19 *herein. (See also Civ. Code, §§ 1441 [“A condition in a contract, the fulfillment of*
20 *which is . . . unlawful . . . is void”], 1608 [“If any part of a single consideration*
21 *for one or more objects, or of several considerations for a single object, is*
22 *unlawful, the entire contract is void”]).*

23 60. Plaintiff alleges that Defendant WELLS did falsify Plaintiff’s loan application and
24 materially violated the legislative intent of this statute, *id.* As a result of WELLS’ predicate act,
25 Defendant DBNTC’s predecessor in interest illegally accepted the loan without verifying the
26 known information that was provided by Plaintiff to the Defendant, WELLS. Defendant
27 DBNTC, as successor to the named “lender” Accredited, also had a duty under this Act to refuse
28 the loan as it substantially relied on facts known by both parties to be false. The loan was

1 accepted by DBNTC's predecessor as a "full doc" loan package with Plaintiff's U.S. tax returns
2 readily available to the Parties.

3 61. Plaintiff did timely and lawfully rescind the loan and was summarily refused such
4 a lawful rescission by counsel, Ronald Roup, on behalf of DBNTC. What Roup did next was
5 nothing short of illegal as he offered Plaintiff legal advice and counsel in the form of a letter
6 from his office to Plaintiff (See: Adv. Pro. No. 11-02024, DCKT No. 308, Rescission Letter to
7 Roup).

8 62. Plaintiff alleges that the loan application was materially falsified by Defendant
9 WELLS and ratified by Defendant DBNTC. Select and Quality, as Co-Defendants, were
10 complicit in the acts herein by an agency relationship which they carried out with impunity.

11 63. Defendant WELLS has substantially admitted to these exact violations in the
12 Consent Orders issued in the Matter: **UNITED STATES OF AMERICA, BEFORE THE**
13 **BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, WASHINGTON,**
14 **D.C.** In the Matter of: WELLS FARGO & COMPANY, San Francisco, California and WELLS
15 FARGO FINANCIAL, INC., Des Moines, Iowa. Docket Nos. 11-094-B-HC1, 11-094-I-HC1,
16 11-094-B-HC2, 11-094-I-HC2, Order to Cease and Desist and Order of Assessment of a Civil
17 Money Penalty Issued Upon Consent. This Order was issued on July 20th, 2011 and was signed
18 by "Jennifer Johnson" (Bd. Of Governors, Fed. Res. System), "James Strother" (Wells Fargo &
19 Co.) and "Dean Anderson" (Wells Fargo Financial). Plaintiff asks this court to take judicial
20 notice of the above named *Order to Cease and Desist and Order of Assessment of Civil Money*
21 *Penalty Issued Upon Consent*.

22 64. Wells Fargo & Co. and its subsidiary(ies) substantially admitted to the following,
23 an excerpt from the Consent Order: "Income Document Alteration or Falsification... internal
24 controls were not adequate to detect and prevent instances when certain of its sales personnel, in
25 order to meet sales performance standards and receive incentive compensation, **altered or**
26 **falsified income documents and inflated prospective borrowers' incomes to qualify those**
27 **borrowers for loans that they would not otherwise have been qualified to receive.**" This
28

1 admission was not available to Plaintiff until July 20th, 2011 and is material in that it involves the
2 exact issues in this case.

3 65. Plaintiff alleges that Defendant WELLS knew, or had a duty to know, that its
4 employees, agents and other affiliates were falsifying loan documents in order to gain financial
5 advantage over Plaintiff without considering the falsity of their representations and the
6 devastating results it would have on Plaintiff and others similarly situated.

7 66. Plaintiff substantially relied on representations made by Defendants as being true
8 and accurate to this detriment.

9 67. Plaintiff has lost possession of his property and has suffered untold emotional,
10 physical and financial damages as a direct and proximate result of Defendants' acts and
11 omissions.

12 68. Plaintiff is entitled to relief under the Act and shall quantify damages at the time
13 of trial of this matter.

14
15 **SIXTH CAUSE OF ACTION: VIOLATION OF CALIFORNIA BUSINESS &**
16 **PROFESSIONS CODE 17200**

17 69. Plaintiff re-alleges and incorporates by reference all sections of the foregoing
18 Complaint.

19 70. Plaintiff alleges that Defendants, and all of them, are subject to Cal. Bus. & Prof.
20 Code 17200.

21 71. California Business and Professions Code §17200 et seq. prohibits acts of unfair
22 competition, which means and includes any "fraudulent business practice" and conduct which is
23 "likely to deceive" and is "fraudulent" within the meaning of §17200.

24 72. As more fully described above, the acts and practices of Defendants are likely to
25 deceive, constituting a fraudulent business act or practice. See, in particular, foregoing Counts 1-
26 5. This conduct is ongoing and continues to this day.

27
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1 73. Specifically, and as set forth with greater particularity in preceding paragraphs,
2 the named Defendants, and each of them, have engaged and are engaging in deceptive business
3 practices with respect to mortgage servicing, assignments of deeds of trust and the filing of
4 fraudulent foreclosure documents and related matters by, *inter alia*:

- 5 A) Executing false loan transactions with intent to foreclose at a later time and keeping
6 the illicit profits reaped therein,
7 B) Failure to comply with California laws regarding the ability for a party to repay a
8 loan,
9 C) Falsifying loan documents for the benefit of the parties thereto and then using known
10 false instruments to eject those homeowners from their homes,
11 D) Filing known false instruments into court records and having the judiciary rely upon
12 those known false instruments.
13

14 74. California Penal Code §115 prohibits the use of a false instrument. It is a class C
15 felony to execute and record such an instrument. Defendants, and all of them, as a pattern and
16 practice, use these types of false instruments to the damage of Plaintiff and others similarly
17 situated in California.

18 75. Plaintiff alleges that the named Defendants' misconduct, as alleged herein, gave,
19 and has given, Defendants, and each of them, an unfair competitive advantage over their
20 competitors. The scheme implemented by Defendants, in collusion with one another, is
21 specifically designed to defraud California consumers and enrich Defendants at the expense of
22 consumers in this State.

23 76. By reason of the foregoing, Defendants should be enjoined from continuing such
24 practices pursuant to California Business & Professions Code §§17203 and 17204. Plaintiff has
25 suffered injury in fact, including but not limited to, the loss of his real property, severe emotional
26 distress and damage to his creditworthiness. In addition Defendant DBNTC and Select has
27 assessed costs and fees against Plaintiff associated with the wrongful foreclosure activities of the
28

1 defendants. Undoubtedly, other members of the public, similarly have fallen victim to
2 Defendants' deceptive schemes, and are likely to be injured as well.

3 77. The harm to Plaintiff and to member of the general public outweighs the utility (if
4 any) of Defendants' policies and practices. Consequently, their policies and practices constitute
5 unlawful business acts or practices within the meaning of Business & Professions Code §17200.
6 Moreover, the foregoing conduct promotes an incipient violation of a consumer law, or violates
7 the policy or spirit of such law or otherwise significantly threatens or harms competition.

8 78. Plaintiffs are therefore entitled to injunctive relief and attorney's fees as available
9 under Business & Professions Code §17200 et seq. and related sections. The acts and practices
10 described in the foregoing paragraphs are unfair and violate the Business & Professions Code
11 because they constitute violations of all the statutes previously listed above.

12 **WHEREFORE, Plaintiffs pray the Court for an Order and Decree that:**

- 13
- 14 **a. Defendants WELLS and DBNTC, Pursuant to Business & Professions**
15 **Code §17203, their successors, agents and assigns, representatives,**
16 **employees, and all persons who act in concert with them, are**
17 **permanently enjoined from committing all acts of unfair competition in**
18 **violation of §17200 including, but not limited to, the violations identified**
19 **in Counts 1-5 of Plaintiffs' Complaint;**
- 20 **b. Plaintiff is entitled to an award of statutory attorney's fees;**
- 21 **c. Plaintiff is entitled to statutory damages including damages available**
22 **under relevant private attorney general statutes;**
- 23 **d. Defendant Select is permanently enjoined from acting as a loan servicer**
24 **as a result of an illegal loan;**
- 25 **e. Defendant DBNTC is stripped of any authority as purported beneficiary**
26 **of the illegal loan transaction described in Count 1, Illegal Contract;**
- 27
- 28

i. Any other relief that this court deems just and proper.

WHEREFORE, Plaintiffs pray for judgment against the Defendants and each of them as set forth below: The damages claimed by Plaintiffs exceed \$75,000.

6. Plaintiff further prays that the court issue an Order and Decree canceling the Note, Deed of Trust, NOD and Notices of Trustee Sale finding same void as to Plaintiff and

1 that the court instruct the clerk to execute a full deed of reconveyance of the Deed of Trust in
2 favor of Plaintiff.

3 7. For general, consequential and special damages according to proof;

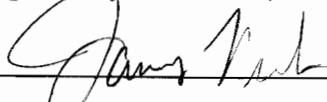
4 8. For punitive damages in an amount sufficient to deter the fraudulent
5 conduct set forth with particularity in Count 1 of this Complaint in the future;

6 9. For reasonable attorney's fees;

7 10. For costs of suit herein; and

8 12. For such other and further relief as the court deems just and proper.
9
10
11

12 Respectfully Submitted,

13 
14 _____

15 James Macklin, Pro Per

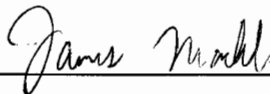
16 Date: April 14, 2014
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DECLARATION OF JAMES MACKLIN

I, James, make this Declaration in support of the Complaint filed herein. I am over the age of eighteen (18) years and am competent to testify to the matters herein. I make this Declaration under penalty of perjury and under the laws of the United States:

1. I did not earn the amount of money that was placed onto a loan application by Defendants in this case that was used to qualify me for a loan by Wells Fargo.
2. I earned substantially less than what was purported to be my income in the subject loan application.
3. I was not aware of the amounts of money that the loan application falsely stated that I earned.
4. I did not lawfully qualify for the loan that was transacted using false information regarding my income.
5. I did lose possession of my real property located at 10040 Wise Rd, Auburn, California, 95603 as a result of the false instruments used by Defendants in this case.
6. I did provide Defendants in this case with my true and correct U.S. tax returns that showed that I earned substantially less than what was placed onto my loan application by Defendants.
7. I have been damaged as a result of Defendant's acts.

Respectfully Submitted,



Date: Apr. 14, 2014

James Macklin, Pro Per

PROOF OF SERVICE:

I am over the age of 18 and not a party to this action.

I am a resident of or employed in the county where the mailing occurred; my home address is: 305 Tuscarora Dr., Crystal Bay, Nv., 89402.

On April 15th, 2014, I served the following document(s) described as: Notice of Motion and Motion for Leave to file second amended complaint, Second Amended Complaint[X] (By U.S. Mail). I deposited such envelope in the mail at Crystal Bay, Nevada with postage thereon fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Service list:

1. Defendant Wells Fargo & Co., 420 Montgomery St., San Francisco, CA., 94163. *CSC - 2710 Gateway Oaks Dr. #150N. Sacramento, CA. 95833*
2. Defendant Select Portfolio Servicing, Inc., Counsel Carr McClelleen, Ingersoll, Thompson & Horn, 216 Park Rd., Burlingame Ca., 94011-0513
3. Deutsche Bank Nat'l Trust Co., as Trustee for AMLT 2006-2 Trust, Carr McClelleen, Ingersoll, Thompson & Horn, 216 Park Rd., Burlingame Ca., 94011-0513.
4. Defendant Quality Loan Services, Inc. agent for service: Bounlet Louvan, 2141 5th Ave., San Diego, Ca., 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 15th, 2014



Victoria Sweigart.

EXHIBIT I

EXHIBIT I

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES L. MACKLIN,

Plaintiff,

v.

MATTHEW HOLLINGSWORTH, et al.,

Defendants.

No. 2:10-cv-1097 MCE KJN PS

ORDER

Presently before the court is plaintiff James Macklin's ("plaintiff") motion for leave to amend his complaint for a second time. (ECF No. 40.) On March 17, 2014, the court ordered plaintiff to file a motion for leave to file a Second Amended Complaint along with a proposed Second Amended Complaint. (ECF No. 39.) In compliance with this order, plaintiff filed a motion for leave to amend on April 15, 2014. (ECF No. 40.) Plaintiff has attached a proposed Second Amended Complaint to his motion.¹ (Id. at 13-38.)

Plaintiff states in his motion for leave to amend that he seeks to add Wells Fargo & Co. ("Wells Fargo") and Quality Loan Service Corporation ("Quality Loan") as new defendants and

¹ Pursuant to the court's March 17, 2014 order, defendants have not filed an opposition to plaintiff's motion for leave to amend. The court stated in this previous order that it would assess plaintiff's motion and proposed Second Amended Complaint and would direct defendants to file a statement of opposition, if any, only if the court determined that such a response would be necessary. (ECF No. 39 at 2.)

1 both proposed parties are named as defendants in the proposed Second Amended Complaint.²
2 (ECF No. 40 at 12.) Furthermore, plaintiff seeks to add causes of action for illegal contract,
3 breach of contract, violations of the Equal Credit Opportunity Act, violations of the Fair Credit
4 Reporting Act, violations of the Truth in Lending Act, and violations of California's Unfair
5 Competition Law.³ Plaintiff states in his motion that he only recently became aware of the
6 alleged involvement of Wells Fargo and Quality Loan in the acts underlying plaintiff's claims and
7 of the facts underlying plaintiff's proposed new claims while this case was stayed during the
8 pendency of plaintiff's bankruptcy proceedings.

9 Federal Rule of Civil Procedure 15(a)(2) governs plaintiff's request for leave to amend.
10 Rule 15(a)(2) provides that "a party may amend its pleading only with the opposing party's
11 written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) further provides that
12 "[t]he court should freely give leave when justice so requires," *id.*, and the Ninth Circuit Court of
13 Appeals has stated that "requests for leave should be granted with 'extreme liberality.'" *Moss v.*
14 *U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (citation omitted). However, the Court of
15 Appeals has also cautioned that "liberality in granting leave to amend is subject to several
16 limitations," which include "undue prejudice to the opposing party, bad faith by the movant,
17 futility, and undue delay." *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th

18 ² The court notes that plaintiff does not name Mortgage Electronic Registration Systems, Inc. as a
19 defendant in the proposed Second Amended Complaint even though it was named as a defendant
20 in the First Amended Complaint. Plaintiff is cautioned that the court cannot refer to a prior
21 complaint, brief, exhibits, or other filings to make plaintiffs' Second Amended Complaint
22 complete. Local Rule 220 requires that an amended complaint be complete in itself without
23 reference to any prior pleading. Thus, once the Second Amended Complaint is filed, it supersedes
24 the First Amended Complaint, which no longer serves any function in the case. Accordingly,
25 because plaintiff no longer names Mortgage Electronic Registration Systems, Inc. in his proposed
26 Second Amended Complaint, a grant of plaintiff's motion will effectively result in a dismissal of
27 Mortgage Electronic Registration Systems, Inc. from this case.

28 ³ Plaintiff does not include in his proposed Second Amended Complaint claims for violations of
the Fair Debt Collection Practices Act, fraud by concealment, Fourteenth Amendment Due
Process violations, Real Estate Settlement Procedures Act violations, and intentional infliction of
emotional distress, which are all stated in the First Amended Complaint. Accordingly, a grant of
plaintiff's motion will effectively result in a dismissal of these claims because the court can no
longer refer to plaintiff's First Amended Complaint if it is to grant plaintiff's motion for leave to
amend.

1 Cir. 2011) (citations and quotation marks omitted); accord AmerisourceBergen Corp. v. Dialysist
2 West, Inc., 465 F.3d 946, 951 (9th Cir. 2006).

3 Additionally, in regards to the permissive joinder of parties, Federal Rule of Civil
4 Procedure 20(a)(2) provides:

5 **(a) Persons Who May Join or Be Joined. . . .**

6 **(2) Defendants.** Persons . . . may be joined in one action as defendants if:

7 (A) any right to relief is asserted against them jointly, severally, or
8 in the alternative with respect to or arising out of the same transaction, occurrence,
9 or series of transactions or occurrences; and

10 (B) any question of law or fact common to all defendants will arise
11 in the action.

12 This rule is conjunctive in nature, requiring an adequate showing under Rule 20(a)(2)(A)
13 and Rule 20(a)(2)(B). In essence, a plaintiff may bring a claim against multiple defendants so
14 long as (1) the claim arises out of the same transaction or occurrence, or series of transactions and
15 occurrences, and (2) there are common questions of law or fact. Fed. R. Civ. P. 20(a)(2);
16 Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997); Desert Empire Bank v. Insurance Co.
17 of North America, 623 F.3d 1371, 1375 (9th Cir. 1980). Only if the defendants are properly
18 joined under Rule 20(a) will the Court review the other claims to determine if they may be joined
19 under Federal Rule of Civil Procedure 18(a), which permits the joinder of multiple claims against
20 the same party.⁴

21 Plaintiff's proposed amendment to add Wells Fargo and Quality Loan as defendants
22 plainly satisfies the requirements of Federal Rule of Civil Procedure 20(a)(2). As to Rule
23 20(a)(2)(A)'s "same transaction, occurrence, or series of transactions or occurrences"
24 requirement, plaintiff has satisfactorily alleged that Wells Fargo and Quality Loan were involved
25 in the origination, underwriting, servicing, and foreclosure of the residential home loan that forms

26 ⁴ Federal Rule of Civil Procedure 18(a) states that "[a] party asserting a claim, counterclaim,
27 crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as
28 it has against an opposing party."

1 the basis of plaintiff's causes of action stated in the Second Amended Complaint. These
2 allegations also satisfy Rule 20(a)(2)(B)'s requirement of the presence of a common question of
3 law or fact common in the action.

4 While the undersigned is cognizant of the fact that the currently-named defendants have
5 not been granted an opportunity to oppose plaintiff's motion for leave to amend⁵ and of the fact
6 that they earlier expressed a desire to oppose such a motion if one were made (see ECF No. 37 at
7 9), it does not appear that they will suffer undue prejudice as a result of a grant of plaintiff's
8 motion. While this case has had quite a prolonged history, primarily due to the automatic stay
9 imposed during plaintiff's bankruptcy proceedings, no discovery has taken place, no pre-trial
10 deadlines have been set, and no defendants have yet answered the First Amended Complaint.
11 Additionally, there is no indication from the record that the proposed amendment is futile, is
12 motivated by bad faith, or that plaintiff acted with undue delay in bringing the present motion.
13 Accordingly, the undersigned grants plaintiff leave to amend in light of the policies favoring
14 liberal amendment.

15 Based on the foregoing, IT IS HEREBY ORDERED that:

16 1. Plaintiff's motion for leave to amend his complaint (ECF No. 40) is granted.

17 2. Plaintiff's proposed Second Amended Complaint found at docket entry 40 at pages 13
18 through 38 is deemed the operative complaint and shall be served as plaintiff's "Second Amended
19 Complaint."

20 3. The Clerk of Court is directed to issue, and serve on plaintiff, a summons as to
21 defendant Wells Fargo & Co.

22 4. The Clerk of Court is directed to issue, and serve on plaintiff, a summons as to
23 defendant Quality Loan Service Corporation.

24 _____
25 ⁵ The court stated in its March 17, 2014 order that defendants need not file an opposition to
26 plaintiff's motion to amend and that the court would "direct defendants to file an opposition to the
27 motion if the court determine[d] that such a response w[ould] be necessary." (ECF No. 39 at 2.)
28 After assessing plaintiff's motion and proposed Second Amended Complaint, the court has
determined that an opposition will not be necessary because, for the reasons noted above,
plaintiff's proposed amendments will not cause defendants any undue prejudice under the
circumstances and do not appear to be futile, made in bad faith, or made with a motive to delay.

1 5. Defendants Wells Fargo & Co. and Quality Loan Service Corporation shall file an
2 answer or other response to plaintiff's Second Amended Complaint within 21 days of being
3 served with the summons and Second Amended Complaint.

4 6. On or before July 21, 2014, defendants who have already appeared in this case and are
5 still named in plaintiff's Second Amended Complaint shall file an answer or other response to
6 plaintiff's Second Amended Complaint.

7 IT IS SO ORDERED.

8 Dated: July 1, 2014

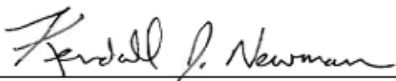

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

EXHIBIT J

EXHIBIT J

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES L. MACKLIN,

Plaintiff,

v.

MATTHEW HOLLINGSWORTH, et al.,

Defendants.

Case No. 2:10-cv-1097-MCE-KJN PS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
DEFENDANTS SELECT PORTFOLIO
SERVICING, INC., AND DEUTSCHE
BANK NATIONAL TRUST CO.'S
MOTION TO DISMISS
[Fed. R. Civ. P., Rule 12(b)(6)]**

Date: August 21, 2014
Time: 10:00 a.m.
Courtroom 25
Judge: Hon. Kendall J. Newman

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I. INTRODUCTION

Plaintiff James L. Macklin's Second Amended Complaint ("SAC") has already been resolved as to defendants Select Portfolio Servicing, Inc ("SPS") and Deutsche Bank National Trust Co. ("DBNT"). The issues he alleges in his SAC were litigated in the Adversary Complaint he filed in the bankruptcy court and resolved when the Honorable Ronald H. Sargis granted DBNT's cross-motion for summary judgment and entered judgment for DBNT and against Mr. Macklin. The allegedly "new" issues he now asserts could have been—and actually were—raised and adjudicated in the Adversary Proceeding. To the extent these "new" causes of action relate to a new transaction nucleus of fact, they would be time barred. Mr. Macklin has had ample opportunity to plead and prove his claims against DBNT and SPS. That he has not been able to eight years later confirms that he has no cognizable claims. Defendants respectfully request that the Court dismiss the SAC without leave to amend.

II. FACTUAL BACKGROUND

While the factual record has been fully developed during the four years the parties have been litigating this dispute, for purposes of this motion the relevant facts include the allegations in the SAC, documents incorporated by reference but not physically attached to the complaint, and judicially noticeable matters of public record. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996); *U.S. v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir.2003); *Lee v. Los Angeles*, 250 F.3d 668, 688–89 (9th Cir.2001) (internal citations omitted).

Mr. Macklin contacted a local Wells Fargo & Company ("Wells Fargo") home mortgage broker to complete the appraisal and loan process to obtain a new residential loan on his then current residence (the "Property"). As part of the loan process, Mr. Macklin alleged that he submitted financial statement, tax returns, and bank statements. (SAC, 15:21-22) Following a telephone interview, Wells Fargo notified Mr. Macklin that he qualified for a new loan that would allow him to draw on the existing equity in the Property. (*Id.*, 15:25-16:2)

Mr. Macklin appeared at a local Wells Fargo branch to sign his loan documents. (*Id.*, 16:3-12). Mr. Macklin admits that he signed all of the loan documents but claims that he did not

1 have sufficient time to review them before doing so. (*Id.*) Mr. Macklin nonetheless left without
2 copies of the documents he just signed. (*Id.*) Mr. Macklin returned to Wells Fargo the following
3 week to pick up his loan documents. (*Id.*, 16:13-18) Mr. Macklin did not review these
4 documents either, only later discovering that the documents he picked up from Wells Fargo were
5 “blank” and contained “minuscule information.” (*Id.*) Wells Fargo explained to Mr. Macklin that
6 the appearance of the documents was customary because the original documents were safely kept
7 by the bank’s custodian. (*Id.*)

8 In April 2006, Macklin borrowed \$659,000 from Accredited Home Lenders, Inc. (the
9 “AHL”). At that time, Macklin executed a promissory note (the “Note”) in favor of AHL. (SAC,
10 ¶ 10; Declaration of Robert A. Bleicher (“Bleicher Decl.”) ¶ 2, Ex. 1) The loan was secured by a
11 deed of trust for \$532,000 (the “Deed of Trust”) and a junior deed of trust for \$127,000.
12 (Bleicher Decl., ¶ 3, Ex. 2)

13 Mr. Macklin defaulted on his obligations in August 2008. (SAC, 16:19-20) Mr. Macklin
14 claims that he then learned for the first time that the loan he agreed to was an interest only loan
15 instead of the fully-amortized loan his Wells Fargo mortgage broker had lead him to believe. (*Id.*,
16 16:20-21) Mr. Macklin contacted the loan servicer in a failed attempt to rescind the loan. (SAC,
17 16: 21-17:3) Mr. Macklin was advised that he had not rescinded the loan. (*Id.*; Bleicher Decl., ¶¶
18 4-5, Exs. 3-4)

19 The foreclosure process was initiated. On December 8, 2008, Windsor Management Co.,
20 as agent for MERS, recorded a Notice of Default. (Request for Judicial Notice (“RJN”), Ex. 6.
21 On January 30, 2008, MERS as nominee of AHL substituted Windsor Management Co. as trustee
22 the trustee. (*Id.*, Ex. 7). On March 10, 2009, Windsor recorded a Notice of Trustee’s Sale. (*Id.*,
23 Ex. 8) On August 21, 2009, DBNT directed the execution of a “Substitution of Trustee,” naming
24 Quality Loan Service Corp. the new trustee. *Id.*, 8. On November 17, 2009, MERS, as nominee
25 for the Lender, executed an Assignment of Deed of Trust to Deutsche Bank, as Indenture Trustee,
26 on Behalf of the Holders of the Accredited Mortgage Loan Trust 2006-2 Asset Backed Notes.
27 *Id.*, Ex. 9. The Substitution of Trustee was recorded on November 25, 2009. QLS, as substituted
28 trustee, then caused a Notice of Trustee’s Sale to be recorded on November 25, 2009. *Id.*, Ex. 10.

1 The Assignment of Deed of Trust was recorded the next business day at 08:00. *Id.*

2 Plaintiff did not offer to tender the amounts due under the loan, and the Property was sold
3 at a foreclosure sale on December 14, 2009. *Id.*, Ex. 11. At the time of the sale, the amount of
4 the unpaid debt with costs was \$623,986.20. *Id.* A foreclosure deed was recorded on December
5 21, 2009, vesting title in Deutsche Bank as the purchaser at the foreclosure sale. *Id.*

6 7 **III. PROCEDURAL BACKGROUND**

8 This dispute between Mr. Macklin, bankruptcy trustees, and various current and former
9 defendants began over four years ago. Over those four years, this dispute has been litigated in
10 five trial and appellate courts, before returning once again to this Court. A brief recitation of this
11 circuitous path demonstrates just how vigorously Mr. Macklin has fought and how thoroughly
12 this dispute has been adjudicated.

13 **A. The Unlawful Detainer Case.**

14 After purchasing the Property at the trustee's sale in December 2009, DBNT filed its
15 complaint for unlawful detainer three months later on March 26, 2010. Mr. Macklin answered
16 the complaint soon thereafter.

17 With the case at issue, DBNT filed a motion for summary judgment on August 24, 2010.
18 Mr. Macklin filed his opposition on September 2, 2010. On September 15, 2010, the court issued
19 a tentative ruling to grant DBNT's motion for summary judgment. At the hearing on September
20 16, 2010, Mr. Macklin appeared with a copy of a voluntary bankruptcy petition.

21 **B. The Superior Court and District Court Civil Actions.**

22 On April 2, 2010, Plaintiff filed a 127-page civil complaint in Placer County Superior
23 Court against DBNT and other defendants, alleging various claims related to the origination,
24 underwriting and servicing of a residential home loan for which he applied and received (Case
25 No. SCV 26905) (the "Superior Court Action"). (RJN, Ex. 12; a copy of the docket is attached as
26 Exhibit 1 to RJN). DBNT removed the action on May 3, 2010 to this Court, Case No. 2:10-cv-
27 01097-FCD-KJN (the "Civil Action"). A copy of the docket in the Civil Action is attached as
28 Exhibit 2 to RJN.

1 Following removal and DBNT's motion to dismiss the complaint (RJN, Ex. 3 at ECF No.
2 9), Plaintiff filed a First Amended Complaint. (Request for Judicial Notice, Ex. 13) This
3 complaint alleges various causes of action related to Plaintiff's residential home loan.
4 Specifically, the First Cause of Action alleges that the foreclosure sale failed to be conducted in
5 compliance with California's statutory scheme for non-judicial foreclosure sales.

6 DBNT and SPS answered and subsequently moved for summary judgment. (RJN, Ex. 2
7 at ECF Nos. 15-16) Plaintiff opposed the motion and objected to DBNT's evidence. (*Id.*, ECF
8 Nos. 17-19). DBNT and SPS replied. (*Id.*, ECF 20) The hearing was set for September 23,
9 2010.

10 **C. The Bankruptcy Case and Bankruptcy Stay.**

11 On September 16, 2010, the day of the summary judgment hearing in the Unlawful
12 Detainer Action and one week before the hearing on DBNT and SPS's motion for summary
13 judgment in the Civil Action, Mr. Macklin filed a Chapter 13 bankruptcy petition in Case No. 10-
14 44610 (the "Bankruptcy Case").¹ (A copy of the docket in the Bankruptcy Case is attached as
15 Exhibit 3 to RJN). Plaintiff's case was subsequently converted to a proceeding under Chapter 7.
16 (RJN, Ex. 3 at ECF Nos. 31, 32)

17 As a result of the Bankruptcy case, Mr. Macklin was able to take advantage of the
18 automatic bankruptcy stay of the Unlawful Detainer Case pursuant to 11 U.S.C. section 362.
19 Accordingly, the Placer County Superior Court stayed by the Unlawful Detainer Case. Likewise,
20 over the objection of DBNT and SPS, the District Court ruled that the bankruptcy stay operated to
21 stay Mr. Macklin's prosecution of the Civil Action. (RJN, Ex. 1 at ECF No. 25).

22 **D. The Adversary Proceeding.**

23 On January 13, 2011, Macklin filed his Complaint in the adversary proceeding, Case No.
24

25 ¹ Although only days before the District Court was set to rule on DBNT's motion for summary judgment, the true
26 motive for the timing of Plaintiff's bankruptcy filing was a hearing on a summary judgment motion in an unlawful
27 detainer action DBNT brought against Plaintiff and his son to regain the premises that served as security of the loan
28 at issue in the Civil Action and Adversary Proceeding. (Placer County Superior Court Case No. MCV 45238). The
day before Plaintiff's bankruptcy filing, the unlawful detainer court issued a tentative ruling granting summary
judgment in favor of DBNT. Although stayed from entering an order against Plaintiff, the Court entered summary
judgment as to Plaintiff's son.

1 11-002024 (the “Adversary Proceeding”). (RJN, Ex. 14) A copy of the docket in the Adversary
2 Proceeding is attached as Exhibit 4 to RJN. The Complaint alleged six causes of action: (1) a
3 determination of the nature, extent and validity of any lien held by DBNT; (2) a determination
4 that the underlying note has been satisfied or converted to unsecured debt; (3) damages for
5 DBNT’s violation of the Truth-in-Lending Act by failing to notify Macklin that it obtained an
6 interest in the mortgage loan; (4) fraudulent conveyance of the assignments and trust deeds; (5)
7 libel; and (6) quiet title to the Wise Road Property. (RJN, Ex. 14)

8 On May 19, 2011, the Court entered a preliminary injunction related to the foreclosure
9 sale and disposition of the Property. (RJN, Ex. 15) On May 20, 2011, following a hearing and
10 argument, the Court granted DBNT’s Motion to Dismiss. (RJN, Ex. 4 at ECF No. 97) The Court
11 granted Macklin leave to amend the Complaint as to his third, fourth, fifth and sixth causes of
12 action, as well as to allege any affirmative claims arising out of his first and second causes of
13 action. (*Id.*) The Court did not grant leave to amend the first and second causes of action. (*Id.*)

14 On June 17, 2011, Plaintiff filed his First Amended Complaint in the Adversary
15 Proceeding (“FAC”). (RJN, Ex. 16) On August 3, 2011, DBNT filed a motion to dismiss the
16 FAC. (RJN, Ex. 4 at ECF No. 150.) Following hearing, the Court issued its order dismissing all
17 but two of the causes of action. (RJN, Ex. 18)²

18 In relevant part, the Bankruptcy Court granted Deutsche Bank’s motion *with prejudice* as
19 to the first (Truth in Lending Act), second (Real Estate Settlement Procedures Act), third (Fair
20 Credit Reporting Act), fourth (Fraud), fifth (Unjust Enrichment), sixth (Civil RICO), seventh
21 (Business and Professions Code § 17200) and eighth (Breach of Security Agreement) causes of
22 action. (*Id.*) The Court, however, allowed Mr. Macklin to proceed with his causes of action for
23 Wrongful Foreclosure and Quiet Title. DBNT answered the surviving causes of action on
24 February 28, 2012. (*Id.*, Ex 4 at ECF No. 228.)

25
26
27 ² In a procedurally improper attempt to avoid dismissal of his first amended complaint, Mr., Macklin filed a Motion
28 to Re-Argue” the motion to dismiss the first amended complaint and to file a further amended complaint. (RJN, Ex.
4 at ECF No. 295) The Court denied Mr. Macklin’s attempts to re-characterize his pleadings and arguments. (RJN,
Ex. 4 at ECF No 220)

E. Resumption of the Unlawful Detainer.

DBNT obtained relief of the bankruptcy stay on February 4, 2011. (RJN, Ex. 3 at ECF No. 100) DBNT later vacated a preliminary injunction related to its prosecution of the Unlawful Detainer Action on September 20, 2011. (RJN, Ex. 4 at ECF No. 100) Two years after it purchased the Property, DBNT was once again free to seek possession of the Property.

DBNT filed its motion for summary judgment in the Unlawful Detainer action on October 21, 2011. Mr. Macklin filed his opposition, along with a request for even more time, on October 28, 2011. As it had done one year earlier, the Court again issued a tentative ruling granting summary judgment of DBNT. Following a hearing on the motion on November 3, 2012, the trial court adopted its tentative on December 8, 2012. (RJN, Ex. 17)

F. Appeal and Affirmation of the Unlawful Detainer Judgment.

Before DBNT could take steps to acquire possession of the Property, and even before the order and judgment were entered, Mr. Macklin sought a stay pending appeal. On December 20, 2011, the Court granted Mr. Macklin a temporary stay to permit the parties to more fully brief the propriety of a stay under these circumstances. As was the case when Mr. Macklin sought injunctive relief, this stay was conditioned upon Mr. Macklin's posting of an undertaking. Also as with Mr. Macklin's prior injunctive relief, he soon defaulted on his obligations. The trial court ordered the stay vacated on February 23, 2012.

Following a hearing on August 16, 2012, the Appellate Division of the Placer County Superior Court affirmed the trial court's summary judgment in favor of DBNT. (RJN, Ex 22).

G. Withdrawal of the Bankruptcy Reference.

Although the District Court had previously declined to allow the Civil Action to proceed during the bankruptcy case, DBNT sought to avoid duplicative litigation of the Adversary Proceeding and the Civil Action by requesting that the District Court withdraw the bankruptcy reference in Case No. 2-12-cv-01752-GEB-JFM (the "Withdrawal Case") so that the Adversary Proceeding could be consolidated with the Civil Action. A copy of docket form the Withdrawal Case is attached as Exhibit 5 to the RJN. DBNT filed this motion on June 29, 2012. (RJN Ex. 19) Mr. Macklin opposed the motion. (RJN, Ex. 20) In opposing the motion, Mr. Macklin

1 argued:

2 Deutsche highlights the depth ***the bankruptcy court has delved***
3 ***into the facts of the case already***. To start at the beginning with a
4 new judge, would be a huge waste of judicial resources and the time
5 the Bankruptcy Court put into the case in making its rulings. The
6 court has already delved into the documents including all the
7 county recorder documents, the Mortgage back security trust and its
8 Master Sales and Servicing Agreement (almost 1000 pages), as well
9 as all of the documents produced by Mr. Macklin and Deutsche in
10 the case. ***Another court will have to repeat that same review that***
11 ***the Bankruptcy court has already undertaken.***

12 To re-educate a new court on the issues falls squarely within the
13 consideration of costs to the parties of whether to withdraw the
14 reference. . . . Mr. Macklin should not have to incur additional
15 attorneys fees and costs because Deutsche wants ***a second bite at***
16 ***the issues which have already been adjudicated by the Bankruptcy***
17 ***court....***

18 *Id.* at pp. 6 (emphasis added).

19 Consistent with Mr. Macklin's argument, the District Court denied the motion to
20 withdraw the reference. (RJN, Ex. 21) Particularly compelling to the District Court was the
21 Bankruptcy Court's intimate familiarity with the dispute and ability to make proposed findings of
22 fact and conclusions of law:

23 ...[T]he bankruptcy court 'has a better vantage point from which to
24 make proposed findings of fact and conclusions of law in the first
25 instance.' [Citation] Further, Deutsche has not shown that judicial
26 efficiency would be promoted by consolidating the Adversary
27 Proceeding with the "pending" Civil Action since that action has
28 been stayed since October 6, 2010, and the judge to whom the
action was assigned, the Honorable Frank C. Damrell, retired
during the pendency of the stay. [Citation]

'In sum, none of [Deutsche's] arguments support its contention that
withdrawal of the reference would promote an efficient use of
judicial resources. Indeed, for this Court to become familiar with
the facts and law of [the Adversary Proceeding] would ***duplicate***
much of what [the bankruptcy court] has already accomplished.'

(*Id.*, at 6-7) (emphasis added). Implicit in the District Court's logic is that efficiency would not
be served because the Bankruptcy Court, who was more familiar the facts and procedure of the
dispute, would render a decision making it later unnecessary for the District Court to later resume
litigation of the dispute.

H. Resumption of the Adversary Proceeding and Further Motion to Amend.

Following the District Court's directive that the parties' resolve their dispute in the Adversary Proceeding instead of the Civil Action, the parties resumed litigation before the Bankruptcy Court. Undeterred by the Court's prior stern admonitions, Mr. Macklin *yet again* moved the court to amend his complaint on October 4, 2012. (*See* RJN, Ex. 23) Yet again, Mr. Macklin sought to add causes of action for TILA (two theories) and California Business & Professions Code section 17200. (*Id.*) And yet again the Bankruptcy Court rejected Mr. Macklin's attempts. (RJN, Ex. 24)

Frustrated with Mr. Macklin's inability to state a cogent claim on these theories despite numerous attempts and guidance from the Court, the Court noted Mr. Macklin's repeated efforts to blame the posture and insufficiency of his case upon his prior counsel, as he does again here, without ever providing a meritorious argument for amendment. (RJN, Ex. 25 at 5-6)

In particular, the Bankruptcy Court reviewed each cause of action Mr. Macklin now seeks to advance under TILA and UCL. With respect to Mr. Macklin's proposed Second Amended Complaint's alleged TILA violation for failure to verify income, the Bankruptcy Court held:

The Plaintiff seeks to amend his cause of action by adding a second count under TILA for failure to verify his income. The court *finds* no requirement under the applicable statute (15 U.S.C. § 1602) or regulation (Regulation Z, 12 C.F.R. § 226.32) to verify income in this transaction.

The Plaintiff in his Points and Authorities asserts a violation of 12 C.F.R. § 226.32(e)(1). The court is unable to find this statute, finding § 226(d)(8)(iii) as the final text in § 226.32. FN.1. Since the Plaintiff has cited Reg. Z, 12 C.F.R. § 226.34 to support an income verification requirement and 15 U.S.C. § 1641(e)(1) to support assignee liability, the court has reviewed the issue in this light.

Subsection (a) of 12 C.F.R. § 226.34 cites meeting the requirements of § 226.32 as a condition precedent to the application of § 226.34. The Plaintiff has not plead that this transaction meets those requirements. Exhibit B, attached to the motion, is a copy of the Note that shows a 6.125% interest rate. Dckt. 290, Ex. B.

Section 226.32(a)(1)(I) applies only to loans that are more than eight (8) percent above the current Treasury rate for a similar term. Subsection (ii) indicates it would apply to loans where more than eight (8) percent was spent on points and fees. Section 226.32(a)(2)(I) indicates it does not apply to a residential mortgage transaction. The court finds that a 6.125% interest rate cannot be

1 more than eight percent above a Treasury rate, even if that rate was
2 zero. The Plaintiff has not pled that he has met this condition
precedent.

3 The court finds the condition precedent was not met, hence the
4 lender had no requirement to verify income under TILA for this
transaction, thus no TILA violation.

5 With respect to the proposed Second Amended Complaint's claim of assignee liability for
6 failure to verify income, the Bankruptcy Court found:

7 The plaintiff argues that liability for TILA violations at signing
8 extend to Deutsche Bank National Trust Company as an assignee of
the deed of trust. To be liable for TILA violations as an assignee,
9 the TILA violation must be apparent on the face of the disclosure
statement from the assignor. 15 U.S.C. § 1641(e)(1)(A).

10 To support that the violation was plain on its face, the Plaintiff cites
11 Reg. Z, 15 U.S.C. 226.34(a)(4)(ii)(A) requiring the lender to verify
income or assets relied upon to determine the borrower's ability to
12 repay by using IRS forms or other reasonably reliable documents.
To support a TILA violation, the lack of income documentation as
13 described by this statute must make it apparent to a purchaser of the
note that a violation existed at inception. The Plaintiff does not
14 allege the disclosure statement would make it apparent that a
violation existed at inception to a later purchaser of the note.

15 As discussed above, the court does not find a TILA violation linked
to income verification. Assuming arguendo there is an income
16 verification requirement, the court finds the Plaintiff has not plead
how a person purchasing the note would realize there was a failure
17 to verify income from the documents accompanying the note. The
Plaintiff alleges that his production of the documents would make it
18 apparent if someone researched the materials supporting the
disclosure statement. Requiring research to validate the disclosure
19 statement against underlying documentation does not make a
violation plain on its face.

20 Presumably there would be an assertion in the contract language
21 that such had been checked. As such, Deutsche Bank National Trust
Company would have a fraud action against the seller, but unlikely
22 that assignee liability would arise. The court finds in the alternative
that the falsified income contained within the disclosure statement
23 would not appear plain on its face to a future purchaser.

24 With respect to Mr. Macklin's attempt to litigate rescission under TILA, the Bankruptcy
25 Court found:

26 The Plaintiff argues that under 11 U.S.C. § 1635, the Plaintiff has
27 an absolute right to rescind for TILA violations. Plaintiff asserts
only notice to the lender is required to effect rescission. The court
28 finds the Plaintiff was entitled send a notice of his intent to rescind,

1 however, the court finds the time to litigate the validity of the
2 rescission has passed.

3 . . .

4 The court follows the controlling Ninth Circuit precedent finding
5 the one-year statute of limitations began when the lender made
6 clear its intention not to unwind the transaction in the March 31,
7 2009 letter from Roup & Associates.

8 In the alternative, the court finds that the Plaintiffs Notice of
9 Rescission was not a proper notice of rescission because it did not
10 offer to tender the loan principal. 12 C.F.R. §§ 1026.15(d)(3),
11 1026.23(d)(3). As such, the Plaintiffs right to assert TILA
12 violations would have expired at the later of 3 years or sale of the
13 property, which occurred on December 19, 2009.

14 With respect to the cause of action under California Business & Professions Code section
15 17200, the Bankruptcy Court found numerous issues:

16 The Plaintiff has reiterated his claim under California Business &
17 Professions Code § 17200 et seq. The Points and Authorities seek
18 to amend the complaint to plead a violation of California's Unfair
19 Competition Law (UCL) under the unlawful prong based on the
20 TILA violations.

21 The Plaintiff has alleged two different basis for his TILA violations,
22 failure to verify income and failure to rescind following
23 notification. The court has addressed both of these issues above and
24 found no support for the alleged TILA violations. Since no
25 violation was found, the Plaintiffs pleading of unlawful acts fails to
26 support the motion to amend the UCL cause of action.

27 In the alternative, the court finds that Plaintiff has failed to plead
28 sufficiently Deutsche Bank National Trust Company liability since
it was not a party to any of stated TILA violations.

29 In the end, despite numerous attempts in the Adversary Proceeding to allege something
30 more than a technical violation of in the nonjudicial process, including alleged wrongdoing in the
31 loan process, underwriting, funding, administration, default and foreclosure, Mr. Macklin was left
32 to proceed on his two surviving causes of action for wrongful foreclosure and quiet title.

33 **I. Summary Judgment for Deutsche Bank.**

34 With the pleadings finally settled, Mr. Macklin moved for summary judgment on his
35 wrongful foreclosure and quiet title causes of action. (RJN, Ex. 4 at ECF No. 307) DBNT cross-
36 moved for judgment on the undisputed factual record. (RJN, Ex. 4 at ECF No. 314) On May 24,

1 2013, the Court entered summary judgment in favor of DBNT and against Mr. Macklin. (RJN,
2 Exs. 26-27) Judgment was entered on July 2, 2013 (the “Judgment”). (RJN, Ex. 28)

3 Predictably, Mr. Macklin moved to vacate the judgment, again casting the blame on his
4 three prior attorneys rather than the merits of his case. (RJN, Ex. 4 at ECF No. 338) The Court
5 denied the motion. (RJN, Exs. 29-30)

6 Mr. Macklin appealed the Judgment. (RJN, Ex. 4 at ECF No. 361) The Ninth Circuit
7 Bankruptcy Appellate Panel (“BAP”) dismissed the appeal for lack of jurisdiction. (RJN, Ex. 31)
8 Mr. Macklin now attempts to revive his resolved and dismissed claims in this forum.

9 10 IV. LEGAL STANDARD

11 The cornerstone of a sufficiently plead complaint is Federal Rule of Civil Procedure Rule
12 8, which requires a plaintiff to “plead a short and plain statement of the elements of his or her
13 claim, identifying the transaction or occurrence giving rise to the claim and the elements of the
14 prima facie case.” *Bautista v. Los Angeles County*, 216 F.3d 837, 840 (9th Cir. 2000). The
15 complaint, therefore, cannot merely allege that a wrong has been committed and then demand
16 relief. Rather, the complaint must give fair notice and state the claim’s elements plainly and
17 succinctly; it must allege at least with a sufficient degree of particularity the overt facts which the
18 defendant engaged in to support the claim. *Jones v. Community Redev. Agency*, 733 F.2d 646,
19 649 (9th Cir. 1984).

20 Recent decisions by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544
21 (2007) and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009) make it clear that to survive a
22 Rule 12(b)(6) motion,

23 ... a complaint must contain sufficient factual matter, accepted as
24 true, to “state a claim to relief that is plausible on its face.” A claim
25 has facial plausibility when the plaintiff pleads factual content that
26 allows the court to draw the reasonable inference that the defendant
is liable for the misconduct alleged....The plausibility standard is
not akin to a “probability requirement,” but asks for more than a
sheer possibility that a defendant has acted unlawfully.

27 *Iqbal*, 556 U.S. at ___, 129 S. Ct. at 1949 (citations omitted). Thus, in order to survive a Rule
28 12(b)(6) motion, the complaint must allege “more than labels and conclusions” or a “formulaic

1 recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555.

2 The Supreme Court’s guidance in *Iqbal/Twombly*, coupled with the pleading requirement
3 of Rule 8, require dismissal under Rule 12 (b)(6) where there is either a “lack of a cognizable
4 legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.”
5 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *Greahling v. Village of*
6 *Lombard, Ill.*, 58 F.3d 295, 297 (7th Cir. 1995).

7 Although the general rule in resolving a Rule 12(b)(6) motion is to construe the complaint
8 in the light most favorable to the plaintiff and accept as true all well-pleaded factual allegations,
9 *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996), a court is not required to
10 accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or
11 unreasonable inferences.” *In re Gilead Sciences Securities Lit.*, 536 F.3d 1049, 1055 (9th Cir.
12 2008) (citation omitted). Likewise, the court need not accept as true allegations that contradict
13 facts which may be judicially noticed by the court. *Von Saher v. Norton Simon Museum of Art at*
14 *Pasadena*, 578 F.3d 1016, 1021-22 (9th Cir. 2009).

15 Where “it is clear that the complaint could not be saved by an amendment,” the Court may
16 grant a Rule 12(b)(6) motion without leave to amend. *Livid Holdings Ltd. v. Salomon Smith*
17 *Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2006).

18 V. LEGAL ARGUMENT

19 Macklin alleges six different causes of action against the defendants. None of these
20 causes of action state a viable claim against defendants DBNT and SPS.

21 A. Macklin’s claims against Deutsche Bank and SPS are barred by the doctrine 22 of res judicata.

23 1. Deutsche Bank and SPS may properly raise the affirmative defense of 24 res judicata by way of a Rule 12 motion to dismiss.

25 A defendant may move to dismiss a complaint pursuant to Rule 12 on grounds that the
26 complaint, or a portion thereof, is barred by the doctrine of res judicata so long as doing so does
27 not raise any disputed issues of fact. *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir.1984);
28 *Day v. Moscow*, 955 F.2d 807, 811 (2d Cir.1992); Fed. R. Civ. Proc. 8(c). Where the res judicata

1 argument is based on the plaintiff's complaint in the present case and the plaintiff's dismissed or
2 adjudicated complaint in another case, the res judicata argument does not raise a disputed issue of
3 fact. See *Conway v. Geithner*, 2012 WL 1657156 (N.D. Cal. May 10, 2012).

4 **2. The Ninth Circuit's res judicata law applies to Macklin's SAC.**

5 In determining the applicable res judicata doctrine, the Ninth Circuit holds that a federal
6 district court sitting in diversity must apply the res judicata law of the state in which it sits.
7 *Gramm v. Lincoln*, 257 F.2d 250, 255 n.6 (9th Cir. 1958) (federal court sitting in diversity
8 jurisdiction applies claim preclusion law of the forum state); see also *St. Paul Fire & Marine Ins.*
9 *Co. v. Weiner*, 606 F.2d 864, 868 (9th Cir. 1979) (federal court sitting in federal question
10 jurisdiction applies claim preclusion law of the forum state). Thus, California's res judicata law
11 controls this diversity suit.

12 Under California law, however, when determining the res judicata effect of a prior federal
13 court judgment, the court should apply federal standards. *Younger v. Jensen*, 26 Cal.3d 397, 411
14 (1980); *Levy v. Cohen*, 19 Cal.3d 165, 172-73; 4 B. Witkin, California Procedure, Judgments,
15 156(b) (2d ed. 1971). Therefore, federal res judicata standards apply to determine the preclusive
16 effect of the prior Judgment in the Adversary Proceeding.

17 **3. The Judgment bars Macklin's claims against DBNT and SPS.**

18 The doctrine of res judicata provides that a final judgment on the merits bars further
19 claims by the parties or their privies based on the same cause of action. *Tahoe-Sierra Pres.*
20 *Council v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir.2003).

21 It prohibits the re-litigation of any claims that were not only actually raised but also could
22 have been raised in the prior action. *Western Radio Servs. Co., Inc. v. Glickman*, 123 F.3d 1189,
23 1192 (9th Cir.1997). It is immaterial whether the claims asserted subsequent to the judgment
24 were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether
25 they could have been brought. *Tahoe-Sierra Pres. Council*, 322 F.3d at 1078. This broad scope
26 effectuates the doctrine's purpose of "reliev[ing] parties of the cost and vexation of multiple law
27 suits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance
28 on adjudication." *Marin v. HEW, Health Care Fin. Agency*, 769 F.2d 590, 594 (9th Cir. 1985)

1 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

2 The Ninth Circuit holds that three elements must be present in order for res judicata to be
3 applicable: (1) an identity of claims; (2) a final judgment on the merits; and (3) the same parties
4 or privity between the parties. *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137,
5 1143 n. 3 (9th Cir.2002) (citing *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713
6 (9th Cir.2001)).

7 **a. The claims in the Adversary Proceeding and SAC in the Civil**
8 **CourAction are identical.**

9 An identity of claims exists when two suits arise from the same transactional nucleus of
10 facts. *Tahoe-Sierra Pres. Council*, 322 F.3d at 1078. Two events are part of the same
11 transaction or series of transactions where the claims share a factual foundation such that they
12 could have been tried together. *Western Systems, Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir.1992).
13 “Different theories supporting the same claim for relief must be brought in the initial action.” *Id.*

14 Here, the transactional nucleus of facts governing the claims that could have (and were)
15 brought in the Adversary Proceeding encompasses all issues related to Mr. Macklin’s refinancing
16 of his residential mortgage with Wells Fargo in 2006, the terms of his residential loan, the
17 servicing of his residential loan, and the nonjudicial foreclosure on the Property following a
18 declared default on the residential loan. (*See generally* Adversary Proceeding) Mr. Macklin had
19 numerous opportunities to amend his complaint and was very broad in his allegations, which
20 included far-reaching conspiracies implicating the mortgage-backed securities industry.

21 Now, Mr. Macklin attempts to assert claims arising out of the same nucleus of fact at issue
22 in the Adversary Proceeding, an action based on the same events he asserts here: the residential
23 loan application process, the underwriting of the loan, the servicing of the loan, and the
24 foreclosure process. (*See generally*, SAC)

25 Indeed, the Honorable Ronald Sargis considered and rejected many of the exact same
26 theories that Mr. Macklin now seeks to add to his SAC when the Court denied Mr. Macklin leave
27 to file a second amended complaint in the Adversary Proceeding. (RJN, Exs. 24-25) Although
28 these theories were never expressly added to the pleadings in the Adversary Proceeding, this is no

1 excuse to the bar of res judicata. To the contrary, Mr. Macklin's argument that his prior counsel
2 could have, but failed to, plead these causes of action in the Adversary Proceeding is an
3 admission that there is an identity of claims in the two cases.

4 Mr. Macklin's attempt to attach different labels to these same claims does not take save
5 them. *Tahoe-Sierra Pres. Council*, 322 F.3d at 1077-78 ("The fact that res judicata depends on
6 an "identity of claims" does not mean that an imaginative attorney may avoid preclusion by
7 attaching a different legal label to an issue that has, or could have, been litigated.") There is an
8 identity of claims in the Adversary Proceeding and the Civil Action. The first requirement of res
9 judicata is satisfied.

10 **b. The Adversary Proceeding resulted in a final judgment on the**
11 **merits.**

12 The second requirement of res judicata is that the prior action must have resulted in a final
13 judgment. Like the other requirements of the doctrine, the requirement that the prior litigation
14 resulted in a final judgment is interpreted broadly so as to include not only judgments but also
15 voluntary and involuntary dismissals of an action with prejudice. *See Headwaters, Inc. v. United*
16 *States Forest Serv.*, 399 F.3d 1047, 1052 (9th Cir. 2005).

17 Here, the Adversary Proceeding resulted in summary judgment. (RJN, Exs. 26-27) The
18 Bankruptcy Court entered judgment on July 2, 2013 (the "Judgment"). (RJN, Ex. 28) The
19 judgment is a final judgment for res judicata purposes. Mr. Macklin cannot get a second attempt
20 at litigating these claims in a different forum in hopes of obtaining a different result.

21 **c. Macklin, DBNT and SPS were parties to the Adversary**
22 **Proceeding.**

23 The third requirement of res judicata is privity of parties. The Ninth Circuit holds that
24 "privity is a *flexible concept* dependent on the particular relationship between the parties in each
25 individual set of cases." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322
26 F.3d 1064, 1081-82 (9th Cir. 2003). On one end of the concept, there is an obvious privity where
27 the parties are identical. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322
28 F.3d 1064, 1081 (9th Cir. 2003).

1 On the other end, privity may still exist even if the parties are not identical so long as
2 “there is ‘substantial identity’ between parties, that is, when there is sufficient commonality of
3 interest.” *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir.1983) (citation omitted); see also
4 *Stratosphere Litigation*, 298 F.3d at 1142 n. 3 (finding privity when a party is “so identified in
5 interest with a party to former litigation that he represents precisely the same right in respect to
6 the subject matter involved”) (citation omitted); *Shaw v. Hahn*, 56 F.3d 1128, 1131–32 (9th
7 Cir.1995) (finding privity when the interests of the party in the subsequent action were shared
8 with and adequately represented by the party in the former action); *United States v. ITT Rayonier*,
9 *Inc.*, 627 F.2d 996, 1003 (9th Cir.1980) (“[A] ‘privy’ may include those whose interests are
10 represented by one with authority to do so.”).

11 The Ninth Circuit elaborated on this fluid relationship in *In re Schimmels*, 127 F.3d 875,
12 881 (9th Cir. 1997), as follows:

13 Federal courts have deemed several relationships “sufficiently
14 close” to justify a finding of “privity” and, therefore, preclusion
15 under the doctrine of *res judicata*: “First, a non-party who has
16 succeeded to a party's interest in property is bound by any prior
17 judgment against the party. Second, a non-party who controlled the
18 original suit will be bound by the resulting judgment. Third, federal
19 courts will bind a non-party whose interests were represented
20 adequately by a party in the original suit.” In addition, “privity” has
21 been found where there is a “substantial identity” between the party
22 and nonparty, where the nonparty “had a significant interest and
23 participated in the prior action,” and where the interests of the
24 nonparty and party are “so closely aligned as to be virtually
25 representative.” Finally, a relationship of privity can be said to exist
26 when there is an “express or implied legal relationship by which
27 parties to the first suit are accountable to non-parties who file a
28 subsequent suit with identical issues.”

22 See also *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (“Moreover, although there are
23 clearly constitutional limits on the ‘privity’ exception, the term ‘privity’ is now used to describe
24 various relationships between litigants that would not have come within the traditional definition
25 of that term.”); *Alpert’s Newspaper Delivery Inc. v. N.Y. Times Co.*, 876 F.2d 266, 270 (2d
26 Cir.1989) (“The issue is one of substance rather than the names in the caption of the case; the
27 inquiry is not limited to a traditional privity analysis.”); *ITT Rayonier*, 627 F.2d at 1003 (“Courts
28 are no longer bound by rigid definitions of parties or their privies for purposes of applying

1 collateral estoppel or res judicata.”).

2 Thus, “privity”—for the purposes of applying the doctrine of res judicata—is a legal
3 conclusion “designating a person so identified in interest with a party to former litigation that he
4 represents precisely the same right in respect to the subject matter involved.” *Southwest Airlines*
5 *Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 94 (5th Cir.), cert. denied, 434 U.S. 832, 98
6 S.Ct. 117, 54 L.Ed.2d 93 (1977) (citing *Jefferson School of Social Science v. Subversive Activities*
7 *Control Board*, 331 F.2d 76 (D.C.Cir.1963)).

8 Applying these guiding principles, federal courts have deemed several relationships
9 “sufficiently close” to justify a finding of “privity” and, therefore, preclusion under the doctrine
10 of res judicata:

- 11 • A non-party who controlled the original suit will be bound by the resulting
12 judgment;
- 13 • A non-party whose interests were represented adequately by a party in the original
14 suit;
- 15 • Where there is a “substantial identity” between the party and nonparty;
- 16 • Where the interests of the nonparty and party are “so closely aligned as to be
17 ‘virtually representative’”; and
- 18 • When there is an “express or implied legal relationship by which parties to the first
19 suit are accountable to non-parties who file a subsequent suit with identical
20 issues.”

21 *Southwest Airlines Co.*, 546 F.2d at 95; *ITT Rayonier*, 627 F.2d at 1003 (citing *Chicago, R.I. & P.*
22 *Ry. Co. v. Schendel*, 270 U.S. 611, 621 (1926)’ ” *id.* (quoting *Aerojet-General Corp. v. Askew*,
23 511 F.2d 710, 719 (5th Cir.), cert. denied, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975)).
24 Finally, a relationship of privity can be said to exist *Id.*; *See also In re Imperial Corporation of*
25 *America*, 92 F.3d 1503, 1505 (9th Cir.1996).

26 Here, there can be no doubt that there is privity between Mr. Macklin and DBNT.
27 Mr. Macklin purchased his claims against DBNT from the Chapter 7 Trustee so that he could
28 pursue the claims individually. (RJN Ex. 3 at ECF No. 136) Mr. Macklin was thereafter the
plaintiff. DBNT was and at all times remained the defendant throughout the Adversary
Proceeding. Mr. Macklin now seeks to bring the same claims against DBNT in the Civil Action.

1 There is an identity of parties, so the requirement as to Mr. Macklin and DBNT is satisfied.

2 Privity also exists between Mr. Macklin and SPS. Although SPS was a non-party in the
3 Adversary Proceedings, the allegations in the SAC confirm that the requisite close relationship
4 and substantial identity exists between DBNT and SPS for res judicata purposes. The SAC
5 alleges that “Defendant [DBNT] is the trustee for the Accredited Mortgage Loan Trust 2006-2.”
6 (SAC, pp. 14) In this capacity, DBNT was the assignee of the beneficial interest in the loan. (*Id.*,
7 ¶ 7 at pp. 20). SPS is a mortgage servicing company (*Id.* at pp. 14-15). Relevant here, SPS was
8 the loan servicer for his residential loan. (*Id.*, at pp. 16-17) Mr. Macklin alleges an agency
9 relationship between DBNT and SPS. (*Id.*, ¶ 62) There is not a single cause of action in the
10 Adversary Complaint and the SAC that attempts to distinguish the alleged conduct of DBNT
11 from that of SPS. To the contrary, Mr. Macklin has always joined the purported actions of DBNT
12 and SPS, and therefore SPS’s interests in the Adversary Complaint were adequately represented
13 by DBNT. The dismissal with prejudice of those claims in the Adversary Proceeding as to DBNT
14 is consequently res judicata as to SPS, as well.

15 The claims in the SAC are therefore barred as to DBNT and SPS by the doctrine of res
16 judicata. DBNT and SPS request that the Court dismiss the SAC with prejudice.

17 **B. Macklin’s claims against Deutsche Bank and SPS otherwise fail.**

18 To the extent Macklin’s claims are not barred by res judicata, his claims nonetheless fail.
19 The causes of action in the SAC fair no better than their predecessors did in the Adversary
20 Proceeding. Mr. Macklin’s vague and conspiratorial allegations fail to coalesce into a legally
21 cognizable theory. To the contrary, the purported wrongdoing by DBNT and SPS are based on
22 unsubstantiated and legally unrecognized theories of agency and assignment related to conduct
23 that is not unlawful.

24 **1. The first cause of action for illegal contract is not a recognized cause of**
25 **action.**

26 Although it is difficult to comprehend specifically what Mr. Macklin alleges, particularly
27 with respect to DBNT and SPS, Mr. Macklin appears to allege that, due to the various defendants’
28 unlawful conduct, an enforceable contract was not formed. On the one hand, Mr. Macklin alleges

1 that Wells Fargo failed to confirm his income. (SAC, ¶ 23) In the alternative, Mr. Macklin
2 appears to allege that Wells Fargo fraudulently induced him into entering in to a contract he could
3 not perform.³ (*Id.*, ¶ 20) Either way, these allegations all focus on Wells Fargo's alleged
4 misrepresentation of Mr. Macklin's income, whether intentional or negligent, and have nothing to
5 do with DBNT and SPS.⁴

6 The basis of Mr. Macklin's allegation that the contract is void and illegal clearly establish
7 that Mr. Macklin's claim is directed towards Wells Fargo. Mr. Macklin seeks to invoke 15
8 United States Code section 1639c, subdivision (a)(1) for the proposition that: "no **creditor** may
9 **make** a residential mortgage loan unless the creditor makes a reasonable and good faith
10 determination ... that ... the consumer has a reasonable ability to repay the loan" Although
11 Mr. Macklin makes many allegations, he does not allege that DBNT or SPS were a creditor who
12 made a "residential mortgage loan."

13 Moreover, even if Mr. Macklin had alleged as much, any failure to comply with Section
14 1639 of the Dodd-Frank Act would not render Mr. Macklin's loan contracts void. This is because
15 Mr. Macklin entered in to the operative loan agreement in August 2006. The Dodd Frank
16 amendment's effective date was not until four years later, on July 21, 2010. Courts interpreting
17 this provision have declared that it does not operate retroactively. *Weller v. HSBC Mortgage*
18 *Servs., Inc.*, 971 F. Supp. 2d 1072, 1077 (D. Colo. 2013). Thus, the loan agreements were not
19 illegal at the time they were entered into, meaning that they did not become illegal based on
20 subsequently enacted non-retroactive legislation.

21
22 ³ Although it is unclear how these allegations pertain to the "illegal contract" cause of action, Mr. Macklin includes
23 argumentative allegations that the contract fails because (1) the Note was not a negotiable instrument under UCC
24 section 3.104(a)(3) because prepayments required notice, and (2) that Note was not timely transferred to the trust
25 before the closing date. The Bankruptcy Court considered these arguments before rejecting them. (RJN, _ at 11-12,
26 14; AP Dckt. No. 98). The Bankruptcy Court squarely rejected Mr. Macklin's argument regarding untimely transfer
27 of the Note into the trust on grounds that Macklin was not a party to the trust relevant agreements. Despite Mr.
28 Macklin's conclusory allegation that he is now a party to these agreements, other courts have rejected this argument.
See In re Davies (9th Cir., Mar. 24, 2014, 12-60003) 2014 WL 1152800 at *2; *Zapata v. Wells Fargo Bank, N.A.*
(N.D. Cal., Dec. 10, 2013, C 13-04288 WHA) 2013 WL 6491377 (citing cases).

⁴ Mr. Macklin apparently alleges that DBNT could not have received the Note into the REMIC because, as a result of
Wells Fargo's allegedly fraudulent conduct, the Note was an impaired asset. (SAC, ¶¶ 12-13) Mr. Macklin
advanced similar variations of this argument in the Adversary Proceeding, which argument was also rejected

1 Finally, even if Mr. Macklin could allege an illegal contract that somehow implicates
2 DBNT and SPS (as opposed to mere rescission), Mr. Macklin must allege the relevant conduct in
3 far greater detail. From what Mr. Macklin has alleged, the conduct at issue triggers the
4 heightened pleading requirements of *Iqbal/Twombly*, particularly here where his contentions are a
5 premised upon claims of vaguely stated purposeful or fraudulent conduct that falls woefully short
6 of the requisite “who, what, where, when, how, and why.” All that Mr. Macklin alleges is that
7 DBNT, “as purported assignee of the false loan, ratified the false acts of [Wells Fargo] where [it]
8 had a duty to refrain from executing a loan in favor of [Mr. Macklin].” For its part, SPS “as
9 purported loan servicer, gave directions to Defendant [Quality Loan Serving, Inc.] to deliver and
10 record an acceleration of debt where no default existed and while relying upon the void contract.”
11 Collectively, DBNT, SPS, and the other defendants each “played their roles in dispossessing [Mr.
12 Macklin] of his property.” (SAC, ¶ 23). Such conclusory and unsubstantiated allegations do not
13 satisfy the pleading requirements of mandated by *Iqbal/Twombly* and Rule 8.

14 **2. The second cause of action for breach of contract fails to state a claim.**

15 Mr. Macklin’s second cause of action alleges that “Defendant(s)” materially breached the
16 Deed of Trust by failing to notify Mr. Macklin of a default and his right to assert the non-
17 existence of a default 30 days prior to acceleration. (SAC, ¶ 33) Mr. Macklin alleges that, in
18 failing to comply with this provision of the Deed of Trust, “Defendant(s)” prevented him from
19 asserting the non-existence of the default.” As a result, Mr. Macklin exercises this contractual
20 right and seeks to prevent “Defendant” from invoking the nonjudicial foreclosure statute. The
21 second cause of action fails for several reasons.

22 First, Mr. Macklin’s allegations are contradicted by judicially noticeable facts. The Placer
23 County Recorder’s Office shows that Accredited Home Lenders, Inc. provided Mr. Macklin a
24 Notice of Default stating that Mr. Macklin was in default of his obligation and providing him
25 more than 30 days to pay the delinquent amount before the remaining obligation would be
26 accelerated and the Property would be sold. (RJN, ¶ 6) There was no breach of the Deed of
27 Trust. *Moreover, as the Notice of Default demonstrates, it was Accredited Home Lenders, not*
28 *DBNT or SPS, who was the lender at the time the notice was provided.*

1 Second, even if Mr. Macklin's allegations were not contradicted by judicially noticed
2 facts, Mr. Macklin still does not allege a material breach. Accepting Mr. Macklin's allegations as
3 true, he did not receive an acceleration notice 30 days before acceleration of his debt and Notice
4 of Default. Relevant here, Paragraph 22 merely provides: "Lender shall give notice to Borrower
5 **prior to acceleration** following Borrower's breach of any covenant or agreement in this Security
6 Instrument ..."). If there was a breach of this provision, this breach would relate only to the
7 "Lender's" right to accelerate the debt. Put another way, the injury to Mr. Macklin would extend
8 only to Mr. Macklin's right to reinstate the loan at the non-accelerated default amount. *See Bisno*
9 *v. Sax*, 175 Cal.App.2d 714, 724-25 (1959) (partial payment of delinquent amount absent
10 acceleration precludes lender from proceedings with foreclosure).

11 Here, Mr. Macklin admits that he ceased making payments in August 2008 after
12 "discovering" that the loan he obtained was an interest-only loan. (SAC, pp. 16). Mr. Macklin
13 does not allege that he tried at any time after August 2008 to make any payments on the loan, that
14 he paid the delinquent amount, or that he would have done so absent acceleration. Assuming
15 DBNT (or SPS) breached Paragraph 22 of the Deed of Trust, such breach was clearly immaterial.

16 Third, Mr. Macklin's claim is barred by res judicata as discussed above. Relevant here,
17 Mr. Macklin previously alleged a "breach of trust instrument" cause of action, alleging that
18 DBNT breached the terms of the Deed of Trust. (RJN, Ex. 16, at ¶ 37) That claim was dismissed
19 with prejudice. (RJN, Ex. 18 at 37-38) Mr. Macklin also alleges that he is entitled to "relief from
20 any action arising from such a breach, judicial or nonjudicial" and that DBNT was "prohibited
21 from invoking the non-judicial foreclosure statute in California." The Placer County Superior
22 Court already approved the foreclosure sale. The Placer County Appellate Division affirmed this
23 decision. Judge Sargis ruled in favor of DBNT on this issue of the foreclosure sale's compliance
24 with California's statutes controlling nonjudicial foreclosure. This issue has been fully litigated
25 and resolved in two courts. Because there is no available relief, the cause of action should be
26 dismissed.

1 **3. The third cause of action for violation of the Equal Opportunity Credit**
2 **Act fails to state a claim.**

3 Mr. Macklin alleges that “Defendants” violated the EOCA by revoking his credit without
4 a proper reason or following its own preconditions to doing so when they failed to provide him
5 thirty days first notice before declaring a default and because there was no default under the terms
6 of the loan agreements because the loan appeared to be performing under the terms of the trust,
7 e.g., lender placed insurance covered Mr. Macklin’s defaults. Mr. Macklin’s claims fail for
8 several reasons.

9 First, Mr. Macklin lacks standing under the EOCA to bring a claim based on alleged
10 wrongful conduct related to the servicing of an existing loan. A lender’s act of declaring a default
11 on an existing credit line, even if otherwise discriminatory, is not an “adverse action” under the
12 EOCA because a mortgagor is not an applicant. *Gorham-DiMaggio v. Countrywide Home Loans,*
13 *Inc.*, N.D.N.Y.2008, 592 F.Supp.2d 283, affirmed 421 Fed.Appx. 97, 2011 WL 1681998 (holding
14 that mortgagor was not an applicant within the plain meaning of the ECOA, and therefore, could
15 not invoke its protections, where any discrimination directed at mortgagor occurred during the
16 servicing of her existing loan, and even after she defaulted, she did not apply for a new loan).
17 Here, Mr. Macklin admits that he was already approved for his loan at the time of DBNT’s and
18 SPS’s alleged wrongful conduct. Indeed, the alleged wrongful conduct concerns the declaration
19 of default and termination of existing credit. These actions are not covered by the EOCA.

20 Second, even if Mr. Macklin did have standing, judicially noticeable facts contradict the
21 predicate conduct Mr. Macklin alleges to have occurred, i.e., initiation of a Trustee’s Sale without
22 prior notice of acceleration. (cite to those facts)

23 Third, Mr. Macklin persists in advancing the argument that, although he “made every
24 installment payment due under the contract until August, 2008,” there was nonetheless “no
25 default” because the loan servicer covered his payments pursuant to a contract with the Trustee.
26 (SAC, ¶ 45) Mr. Macklin advanced this same argument several times in the Adversary
27 Proceeding. Each time, Judge Sargis soundly rejected it. (*See, e.g.* RJN, Ex. 18, at 24-25.) The
28 issue of whether there was a default or not is precluded by the doctrine of collateral estoppel

1 *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326-27 (1979). Mr. Macklin cannot in this
2 Civil Action base claims and causes of action on issues resolved against him in the Adversary
3 Proceeding.

4 **4. The fourth cause of action for FCRA fails to state a claim.**

5 Mr. Macklin alleges that he warned “Defendant” about false information contained in the
6 Notice of Default but that “Defendant” ignored this warning and proceeded with the trustee’s
7 sale. While it is unclear from the vague allegations what precise “warning” he provided,
8 Mr. Macklin is presumably referring to the only alleged correspondence he had with defendants,
9 i.e., his letter he sent to the loan servicer, which elicited a response that Mr. Macklin had not
10 rescinded his loan. (SAC, at pp. 16-17) Mr. Macklin sent this letter in January 2009. (Bleicher
11 Decl., Ex. 3) He received a response in March 2009. (*Id.*, Ex. 4). Mr. Macklin’s claims are
12 barred.

13 Mr. Macklin is precluded from bringing this claim under the doctrines of res judicata and
14 collateral estoppel. In the Adversary Proceeding, Mr. Macklin alleged almost the identical claim
15 as the Third Cause of Action in his First Amended Complaint. (RJN, Ex. 16, ¶ 75) That claim
16 was dismissed with prejudice. (RJN, Ex. 18, at pp 23-26) The claims are therefore barred by res
17 judicata and collateral estoppel.

18 Even if these claims were not barred, Mr. Macklin still has not stated a claim. Mr.
19 Macklin admits that he made all payments until August 2008. (SAC, pp. 16). Thereafter, Mr.
20 Macklin stopped making payments on this Note. (*See id.*; *see also* AP Dckt., 120, at ¶ 75.B) Mr.
21 Macklin was in default. He admits as much. For purposes of the FCRA, although Mr. Macklin
22 may have disputed the amount of default, the fact of default was not in dispute. There is no
23 FCRA violation for DBNT’s or SPS’s failure to furnish any information based on these
24 allegations.

25 **5. The fifth cause of action for TILA fails to state a claim.**

26 Mr. Macklin alleges that DBNT, as successor to the original lender, Accredited Home
27 Lenders, Inc., accepted the loan without verifying the information that was provided by Mr.
28 Macklin to Wells Fargo. Mr. Macklin also alleges that DBNT and SPS failed to honor his

1 rescission request. This claim fails.

2 First, this issue was previously decided by the Bankruptcy Court. In dismissing the First
3 Amended Complaint in the Adversary Proceeding, Judge Sargis found that the so-called
4 rescission letter “was not a rescission, but a demand by Macklin to be paid money, have his note
5 returned to him, and be given property free and clear of the deed of trust.” (RJN, Ex. 18, at pp.
6 19). Likewise, in denying Mr. Macklin leave to file a second amended complaint, Judge Sargis
7 found that there was no TILA violation for failure to verify income on Mr. Macklin’s loan. (RJN,
8 Exs. 24-25).

9 Second, Mr. Macklin cannot invoke the protections of 15 U.S.C. section 1639c when his
10 loan originated several years before enactment of this Dodd Frank amendment. The loan at issue
11 originated in August 2006. The effective date of the Dodd–Frank amendment is July 21, 2010,
12 four years later. The Todd Frank amendments are not retroactive to loans that predate its
13 effective date. *Weller v. HSBC Mortgage Servs., Inc.*, 971 F. Supp. 2d 1072, 1077 (D. Colo.
14 2013).

15 Neither DBNT nor SPS committed any TILA violation. The Bankruptcy Court informed
16 Mr. Macklin of this fact several times. This result is not changed merely because Mr. Macklin
17 now finds himself in a new forum.

18 **6. The sixth cause of action for UCL fails to state a claim.**

19 Mr. Macklin alleges that DBNT and SPS engaged in unfair competition in violation of
20 Business & Professions Code section 17200 (“UCL”) by participating in fraudulent business
21 practices which were likely to deceive and did deceive Mr. Macklin. In particular, Mr. Macklin
22 alleges the following unfair practices:

- 23 • “Executing false loan transactions with the intent to foreclose at a later time and
keeping the illicit profits reaped therein”;
- 24 • “Failing to comply with California laws regarding the ability for a party to repay a
25 loan”;
- 26 • “Falsifying loan documents for the benefit of the parties thereto and then using
27 known false documents to eject those homeowners from their homes”; and
- 28 • “Filing known false instruments into court records and having the judiciary rely
upon those known false instruments.”

1 Mr. Macklin's claims fare no better in the UCL context than they did as stand-alone claims.

2 To state a claim under the UCL, Mr. Macklin must allege that DBNT and SPS committed
3 a business act that is unlawful, fraudulent or unfair. *Levine v. Blue Shield of California*, 189 Cal.
4 App. 4th 117, 1136 (2010). In order to be "unlawful," the act must violate some underlying law.
5 *Cisneros v. Instant Capital Funding Group*, 263 F.R.D. 595, 610 (E.D. Cal. 2009). To be
6 "fraudulent," the act must likely deceive the public. *Schanll v. Hertz Corp.*, 78 Cal. App. 4th
7 1144, 1167 (2000). To be "unfair," there must be a prima facie case of harm borne out of a
8 business practice that violates a legislatively-declared policy.

9 A review of the complaint reveals a disconnect between the facts and what Mr. Macklin
10 would have to plead and prove in order to prevail on his UCL cause of action. Mr. Macklin
11 cannot allege a violation of any law, therefore his claims cannot be unlawful. Mr. Macklin has
12 not alleged any unfair practice or any legislatively-declared policy with respect to his admitted
13 default and DBNT's exercise of its power of sale. To the contrary, this practice is prima facie
14 fair, which fairness on these facts has been confirmed by several different Courts. Finally,
15 although Mr. Macklin makes vague and unsubstantiated claims of fraud, he has not – and cannot
16 – allege any specifics to this far-reaching conspiracy or demonstrate how he was actually harmed
17 by it. DBNT and SPS request that the UCL claim be dismissed with prejudice.

18 VI. CONCLUSION

19 Mr. Macklin has pled, litigated and lost his case against DBNT and SPS. That he has
20 failed at every turn indicates that there is no cause of action. The Bankruptcy Court already
21 reached this result. Mr. Macklin cannot force DBNT and SPS to continue to litigate this same
22 dispute until he gets the result he desires. DBNT and SPS respectfully request that the Court put
23 an end to this dispute once and for all.

24 Dated: July 21, 2014

CARR, McCLELLAN, INGERSOLL, THOMPSON &
HORN Professional Law Corporation

25 By: /s/ Robert A. Bleicher

26 Robert A. Bleicher/J. Craig Crawford
27 Attorneys for Plaintiff, Select Portfolio Servicing,
28 Inc., and Deutsche Bank National Trust Co.

EXHIBIT K

EXHIBIT K

FILED

AUG 4 2014

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

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IN PRO SE

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JAMES L. MACKLIN,

Plaintiff,

vs.

SELECT PORTFOLIO SERVICING, INC.,
DEUTSCHE BANK NAT'L TRUST CO., AS
TRUSTEE FOR THE
CERTIFICATEHOLDERS OF
ACCREDITED MORTGAGE LOAN TRUST
SERIES 2006-2, WELLS FARGO & CO.,
QUALITY LOAN SERVICING, Inc., Et al.,

Defendant(s).

Case No: 2:10-cv-1097-FCD-KJN PS

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS SELECT PORTFOLIO
SERVICING, INC., AND DEUTSCHE
BANK NAT'L TRUST CO., AS TRUSTEE
FOR THE CERTIFICATEHOLDERS OF
ACCREDITED MORTGAGE LOAN
TRUST SERIES 2006-2'S MOTION TO
DISMISS [Fed. R. Civ. P., Rule 12(b)(6)]**

Date: August 21st, 2014

Time: 10:00 a.m.

Courtroom: 25

Judge: Hon. Kendall J. Newman

TO THE COURT, PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that Plaintiff, James Macklin, individually, Opposes Defendants Select Portfolio Servicing, Inc. ("SPS") and DEUTSCHE BANK NAT'L TRUST CO., AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF ACCREDITED MORTGAGE LOAN TRUST SERIES 2006-2 ("DBNTC") Motion to Dismiss under Fed. R. Civ. P. 12 (b)(6).

LEGAL STANDARD

1. For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v.*

1 *McKeithen*, 395 U.S. 411, 421 (1969). To defeat such a motion, the factual allegations must
 2 simply be “enough to raise a right to relief above the speculative level...on the assumption
 3 that all the allegations in the complaint are true (even if doubtful in fact).” *Bell Atlantic Corp.*
 4 *v. Twombly*, 550 U.S. 544 (2007), (quoting 5 Charles Alan Wright & Arthur R. Miller,
 5 *Federal Practice and Procedure* § 1216 (3d ed. 2004)).

6 2. The court must draw all reasonable inferences in the plaintiff’s favor, *Doe v. United*
 7 *States*, 419 F.3d 1058, 1062 (9th Cir. 2005), and presume that general allegations embrace
 8 those specific facts that are necessary to support the claim,” *Lujan v. Nat’l Wildlife Fed.*, 497
 9 U.S. 871, 889 (1990). Thus, factual disputes are properly resolved only on summary
 10 judgment or at trial, not on a motion to dismiss. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327
 11 (1986).

12 3. Defendants here attempt to cloak a summary judgment-style dismissal in the form of a
 13 Rule 12(b)(6) Motion.

14 ARGUMENT

15 4. The Motion should be overruled because the allegations of the Complaint control and
 16 there are material facts in dispute, making this Motion, or Summary Judgment, inappropriate.
 17 Plaintiff’s statements are definite and the facts are all well pleaded and evidenced such that a
 18 controversy is before this court.
 19

20 5. Defendants have summarily ignored the legal effect of *Stern v. Marshall*, 131 Sup. Ct.
 21 2594 (2011) and *Northern Pipeline Const. Co. v. Marathon Pipeline Co.* (*Marathon*) 458 U.S.
 22 50 (1982). Throughout Defendants Motion, the consistent theme is that somehow, the
 23 Bankruptcy court’s rulings are controlling. Both *Marathon* and *Stern v. Marshall* control
 24 otherwise. (See: Def’s MTD MPA’s, Pg. 6, Ln. 7-8 “...raised and *adjudicated in the*
 25 *Adversary Proceeding*”) [Emph. mine].

26 6. Plaintiff’s corpus of his Complaint revolves around the common law principals of
 27 contract, from which all other claims arise as a result of the actions of Defendants. Plaintiff
 28

has sufficiently pleaded facts which, taken as true, form the necessary elements of a common law action. Under *Stern*, Chief Justice Roberts issued his Ruling in the form of a syllogism:

“Major Premise: Congress may create non-Article III courts with power to issue final judgments only for territories, the military and public rights matters.

Minor Premise: The state law claim of Vickie Lynn Marshall does not involve the territories, the military or public rights matters.

Conclusion: It is unconstitutional for the bankruptcy court to issue a final judgment over Vickie Lynn Marshall’s claim.”

7. There is no preclusive effect of either Res Judicata or Estoppel when the Article I judge in Macklin’s Bankruptcy Adversary Proceeding made rulings relevant to his claims. Plaintiff has stated no claims involving the Territories, the military or public rights matters, therefore, under *Stern*, there is no preclusive effect by which Defendants may rely stemming from any of Macklin’s previously stated claims, whether or not dismissed by the lower Article I court.

8. Defendant continually states as facts, which are wholly unsupported by competent fact witness or by competent fact Declaration, numerous assertions that fall short of evidence or testimony. (Def’s MTD, MPA’s, Pg. 6, Ln. 10-11: “That he has not been able to eight years later confirms that he has no cognizable claims”). (Def’s MTD, MPA’s, Pg. 7, Ln. 8: “**In April 2006, Macklin borrowed \$659,000.00 from Accredited Home Lenders, Inc.**”). Macklin specifically has disputed that Accredited Home Loans, Inc. (“AHL”) ever loaned him any money (Plaintiff’s Mot. For Leave to Amend, Pg. 4, Ln. 21-22): “Plaintiff signed for a debt obligation that named Accredited...”). Now see: **Def’s DOC No. 47-8, RFJN, Exhibit “F”**. This is the wiring instruction used in Plaintiff’s loan closing as it was entered into the record of the previous Bankruptcy Adversary Proceeding and noticed herein by Defendant. **Special notice by the court should be taken here.** The wiring instructions specifically show that Accredited Home Lenders, Inc. did not, in fact, wire funds to Macklin’s escrow, rather, an unknown bank named “Centennial Bank of Colorado” was responsible for sending the funds.

1 Centennial was never identified within the closing documents anywhere in any document
2 reviewed or signed by Macklin. This is a material fact in dispute. This one simple fact defeats
3 Defendant's defenses under Rule 12(b)(6). Accredited, although named as a lender in the Note
4 and Deed, never advanced any consideration and were never at risk of loss in the actual
5 transaction that funded Macklin's loan. This is a contract dispute with facts to support the
6 allegation that are undisputed and entered into this court's record by Defendants themselves,
7 thus acting as an admission, or statement, against interest.

8 9. Defendant then states (**Def's MTD, MPA's Pg. 7, Ln. 13**): "Mr. Macklin defaulted on
9 his obligations..." This statement is purely Hearsay and states facts not in evidence. Because
10 Macklin clearly and specifically has refuted the facts contained in the Notice of Default
11 ("NOD"), no conclusion may be drawn from the Bleicher Declaration or the instrument. An
12 evidentiary hearing is the very least that Macklin is entitled to under this scenario. This
13 statement cannot form the foundation for a Rule 12(b)(6) Motion. Macklin's facts are to be
14 taken as true and only a trier-of-fact may make a determination as to the truthfulness of the
15 facts after Macklin has an opportunity to fully discover competent fact witnesses that may
16 have executed the NOD.

17 TRUTH IN LENDING ACT

18 10. **Def's MTD, MPA's, Pg. 7, Ln. 16-17**: "Mr. Macklin contacted the loan servicer in a
19 failed attempt to rescind the loan. Mr. Macklin was advised that he had not rescinded the
20 loan." Defendants again attempt to put Hearsay into the record. Counsel Bleicher, in his
21 Declaration, makes legal conclusions and may not state facts that he does not personally
22 know. Bleicher inappropriately attempts to testify as to the veracity of a rescission of which
23 he has no personal knowledge. Mr. Macklin did, in fact, timely rescind and cancel the debt
24 pursuant to TILA. See: **Plaintiff's Exhibit 1**, Amicus Brief by Chief Counsel for the United
25 States Consumer Finance Protection Bureau ("CFPB"), **Plaintiff's Exhibit 2, Merritt v.**
26 **Countrywide, 9th Cir.** (For Publication, July 16, 2014.) See: **Plaintiff RFJN** attached hereto
27 and made part of this Opposition to MTD.
28

1 11. Congress granted the CFPB the authority to interpret and promulgate rules regarding
2 TILA (12 USC §§ 5481(12)(O), 5512(b)(1), 5581(b)(1). Defendants stated in their MTD (Pg.
3 29, Ln. 9-13) "...Macklin cannot invoke the protections of 15 U.S.C. sec. 1639 c when his
4 loan originated several years before the enactment of the Dodd Frank Amendment."
5 Defendant is misplaced in their reading of the Amendment. The amendment *did* grant
6 authority for CFPB to interpret and apply TILA, and the Bureau is now "the primary source
7 for interpretation and application of truth-in-lending law," *Household Credit Servs. V.*
8 *Pfenning*, 541 U.S. 232, 238 (2004). Thus, CFPB's interpretations of its own Act are the
9 benchmark under which courts must apply the Act.

10 12. Congress enacted TILA in 1968, contrary to Defendants position, the Act, and its
11 attendant provisions, inure to the benefit of Plaintiff herein. TILA requires lenders to provide
12 "clear and accurate disclosures of terms dealing with things like finance charges, annual
13 percentage rates of interest, borrower's disclosures and borrower's rights". *Beach v. Ocwen*
14 *Fed. Bank*, 523 U.S. 410, 412 (1998). §125 of the Act, 15 U.S.C. § 1635, also provides
15 consumers a statutory right to rescind certain types of mortgage loans by giving timely notice
16 to their lenders. Specifically, the right to rescind applies to open-end and closed-end loans
17 secured by a lien on the consumers principal dwelling". See generally 12 C.F.R. §§ 1026.15,
18 1026.23. The right to rescind does not apply to first mortgages. Plaintiff sufficiently alleged
19 that his loan was subject to governance under TILA in his SAC as a refinance loan.

20 13. Under *Merritt v. Countrywide*, 9th Cir, July 16, 2014 (Approved for publication), the 9th
21 Circuit declined to extend the previous mis-application of *Yamamoto v. Bank of New York*,
22 329 F. 3d 1167 (9th Cir. 2003), the panel held that an allegation of tender or ability to tender is
23 not required. The panel also held that only at summary judgment may a court order the
24 statutory sequence of TILA rescission altered and require tender before rescission, and then,
25 only on a case-by-case basis, once the creditor has established a potentially viable defense.

26 14. Exactly like Macklin in this case, the Merritts consummated a refinance of their home
27 loan in 2006. They also received blank loan documents at closing with no proper right of
28

1 rescission documents and no proper disclosures. Quoting *Merritt*: “Under TILA, an obligor
2 has the “right to rescind . . . until midnight of the third business day following the
3 consummation of the transaction or the delivery of the information and rescission required
4 under this section... whichever is later.” 15 U.S.C. § 1635(a). “Regardless of whether the
5 required information and forms have been delivered, [the] obligor’s right of rescission shall
6 expire three years after the date of consummation of the transaction, or upon the sale of the
7 property.” *Id.* § 1635(f).

8 From *Merritt*: “The TILA rescission provisions set out the following sequence of events for
9 pursuing rescission: **First**, the obligor must notify [notice by U.S. Mail is sufficient] the
10 creditor of his intention to rescind, *id.* § 1635(a); **then**, within 20 days after receipt of
11 notice of rescission, the creditor must return to the obligor any security interest, *id.* § 1635(b);
12 **and lastly**, “[u]pon the performance of the creditor’s obligations under this section **i.e., upon**
13 **return of the security interest**], the obligor shall tender the property to the creditor.” *Id.*
14 These procedures “shall apply except when otherwise ordered by a court.” *Id.* This sequence
15 (“first, then and lastly”) is mandatory.

16 “Notably, “[t]he sequence of rescission and tender set forth in § 1635(b) is a reordering of the
17 common law rules governing rescission.” *Williams v. Homestake Mortg. Co.*, 968 F.2d 1137,
18 1140 (11th Cir. 1992) (citing 17A Am. Jur. 2d Contracts § 590, at 600–01 (1991)).
19 Specifically, “[a]lthough tender of consideration received is an equitable prerequisite to
20 rescission, the requirement was abolished by the Truth in Lending Act.” *Palmer v. Wilson*,
21 502 F.2d 860, 861 (9th Cir. 1974) “Under § 1635(b),” consequently, all that the consumer
22 need do is notify the creditor of his intent to rescind. The agreement is then automatically
23 rescinded and the creditor must, ordinarily, tender first. Thus, rescission under § 1635 places
24 the consumer in a much stronger bargaining position than he enjoys under the traditional rules
25 of rescission.” *Merritt v. Countrywide*, 9th Cir. [Emph. mine].

26 15. Macklin has sufficiently alleged that he rescinded his loan timely. Defendant judicially
27 noticed the rescission letter mailed and tendered by Macklin, this rescission notice came
28

1 exactly 2 years and 10 months after the transaction was consummated (Loan date: April 14th,
2 2006; Rescission on Feb 12th, 2009), thus, complying with the rescission requirements of
3 TILA, *id.* (See: Def's Decl., DOC 45-2, Exhibits 3 & 4). When Ronald Roup, as agent for the
4 purported beneficiary, responded with argument and did not tender the money back to
5 Macklin, a material breach of TILA was perfected by Defendants or their predecessors in
6 interest.

7 **16. Assignee's Liability:** An assignee is liable for statutory damages for violations by failure
8 of disclosure TILA requirements by its predecessors and its own violation if it fails to
9 respond properly to a rescission notice. *Palmer v. Champion Mortg.*, 465 F.3d 24, 27 (1st
10 Cir. 2006) ("if a creditor does not respond to a rescission request within twenty days, the
11 debtor may file suit in federal court to enforce the rescission right). See also U.S.C. §
12 1635(b). Defendant DBNTC is purporting to be the assignee of Accredited, the original
13 named lender (not necessarily the true lender under the evidence before this court). SPS
14 admits that it is acting as an agent of DBNTC (See "**privity**" **argument by Defendants**
15 **in Def's MTD, MPA, Pg's. 20-22**). Defendants are liable for damages under TILA. In
16 fact, DBNTC purports to have been the owner of the debt since the closing date of the
17 REMIC trust on June 1st, 2006 (See: **Plaintiff's RFJN, Exhibit 3, Pooling & Servicing**
18 **Agreement for "AMLT 2006-2 Trust" [Def. DBNTC]**). The AMLT 2006-2 Pooling &
19 Servicing Agreement ("PSA") is a permanent record within the U.S. Securities &
20 Exchange Commission's records at www.sec.gov/EDGAR and is deemed self-
21 authenticating evidence under Fed. R. of Evid. Rule 902(5).

22 **17.** There is a statutory requirement governing DBNTC's principal trust at Internal Revenue
23 Code §§ 860D, F & G, that qualified loans must transfer into the trust on or before 90
24 days after the closing date of the REMIC. Thus, if they truly received the loan in trust
25 prior to its mandatory closing date, then DBNTC stands as the party liable under TILA
26 not as an assignee, but as the transferee well before Macklin tendered his rescission. In
27 either case, DBNTC and its agent, SPS, are fully liable for the violations under TILA,
28 *Palmer v. Champion Mortg.*, *id.* Plaintiff does not admit that DBNTC did, in fact, acquire

1 the debt of Macklin before the trust's closing date pursuant to the assignment of deed
2 evidenced by Defendants (See Def's RFJN, DOC 47-8, Ex. J).

3 18. Defendants other defense here is that Macklin was precluded from exercising his TILA
4 rights by virtue of the Dodd/Frank Act. This is preposterous. The Act simply applied the
5 authority of CFPB to the existing TILA legislative intent and the Rules promulgated
6 thereunder. Thus, the Exhibit attached hereto (Plaintiff's Exhibit 1), serves as a written
7 authority by the CFPB (as a governmental agency, CFPB's authority is self-authenticating) for
8 the TILA claims of Macklin, and not the letter written by Ronald Roup, who essentially was
9 handing out bad legal advice to Plaintiff by informing him that his rescission was "not a
10 rescission". See: Def's Decl of Robert Bleicher, Exhibits 3 & 4. Roup's letter smacks of
11 fraud and deceit and invokes the punitive nature of TILA on its face.

12 19. The Bankruptcy court neither had the authority to "inform" Macklin of any facts related
13 to his TILA claim (Def's MTD, Pg. 29, Ln. 15-16), nor to adjudicate the claim. See: "By
14 reversing the traditional sequence for common law rescission claims, TILA 'shift[s]
15 significant leverage to consumers,' consistent with the statute's general consumer-protective
16 goals. Lea Krivinkas Shepard, *It's All About the Principal: Preserving Consumers' Right of*
17 *Rescission under the Truth in Lending Act*, 89 N. C. L. Rev. 171, 188 (2010). Because TILA
18 claims are common law claims, arising out of contract, *Stern v. Marshall, id.*, controls over
19 the Article I court's lack of judicial authority.

20 20. Under TILA, once a written notice is mailed to the creditor, or his agent, the act of
21 rescission is complete. The only form for rebutting the effect of the rescission falls on the
22 creditor, who must file an action to repudiate the rescission, otherwise, after twenty (20) days
23 runs from the receipt of the written notice, the creditor must have returned the borrower's
24 money (within 20 days of receipt) and then file an action repudiating the rescission. Macklin
25 rescinded his loan in February, 2009, 2 years and 9 months after the loan was written. This is
26 within the three (3) years established by TILA for a timely rescission. The time for an action
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28

1 to be filed by Macklin is not delineated or mandated anywhere in TILA. See: **Plaintiffs**
 2 **Exhibit 1, Amicus Brief, Pg. 5, Par. 3; Pg. 6, Par. 1; Pg. 6, Par. 4; Pg. 7, Par's 1- 2.**

3 21. On April 28th, 2014, the U.S Supreme Court granted certiorari to petitioners in *Jesinoski*
 4 *v. Countrywide Home Loans*¹. Appellant's briefs are filed and Respondent Briefs are due
 5 shortly. The court will decide a deepening Circuit split that has developed since 2012. In its
 6 Brief, the CFPB summarily decimates the 9th Circuits reading, and incorrect holding, under
 7 *Beach*, and *Yamamoto*, *id.* Because the CFPB is authorized to promulgate its own rules, the
 8 Court is expected to view CFPB's authority as binding and all-inclusive.

9 22. "Further, [the *Merritt*] approach better comports with the TILA statutory text, which
 10 prescribes an enforcement sequence except when "otherwise ordered by a court." 15 U.S.C.
 11 § 1635(b). If all obligors had to allege ability to tender payment when seeking rescission and
 12 so allege in a complaint for enforcement of the rescission obligation, then (1) the requirement
 13 of doing so would no longer be an exception, and the requirement would not be "otherwise
 14 ordered by a court," as a complaint initiates suit before any court order issues". *Merritt*, *id.*

15 23. Plaintiff asks this court to see **Plaintiff's Exhibits 4, 5 and 6, Loan Application,**
 16 **Underwriting Instructions/Tax Returns and Truth In Lending Disclosures.** The complete
 17 disregard for Plaintiff's actual income, as defined by his tax returns which were provided to
 18 Defendant's predecessors in interest, is evidenced within those Exhibits. Defendants admit
 19 that these exhibits are bona fide as they were provided to Plaintiff by Defendant during
 20 discovery in this case back in 2010. Plaintiff never earned the amounts disclosed in the
 21 application and the amounts are a clear violation of disclosures under TILA and under
 22 California law. See: **Plaintiff's Mem. Of Pts. & Auth., Motion for Leave, Declaration of**
 23 **James Macklin.**

24
 25
 26 ¹ National Housing Law Project's Housing Law Bulletin. See Clare Lakewood, Certiorari Granted in TILA Circuit
 27 Split: How Can Borrowers Rescind Their Mortgages?, 44 HOUS. L. BULL. 103 (June 2014). Ms.
 28 Lakewood is a volunteer at NHLP and is admitted as a barrister and Solicitor of the High Court of Australia and the
 Supreme Court of Western Australia (2009).

² *Jesinoski v. Countrywide Home Loans Inc.*, 729 F.3d 1092 (8th Cir. 2013), cert. granted, 82
 U.S.L.W. 3366 (U.S. Apr. 28, 2014) (No. 13-684).

24. Defendants attack on Plaintiff's claim under TILA fails as a substantive matter based on these facts. No ruling made by the Bankruptcy court is binding against Macklin related to his TILA claims. Defendant lacks authority upon which to base a Rule 12(b)(6) Motion. Macklin filed his original Complaint against Defendants on April 13th, 2009, exactly 6 days before the 3 year statute would have run out. Its subsequent removal to this court came later. This assumes arguendo that the court would impose a strict time limitation for filing suit, which TILA does not address in its legislative intent or the plain language of the statute. Plaintiff is entitled to relief under TILA by operation of law and by all of the facts contained herein. Defendant cannot dispose of this claim under Rule 12(b)(6).

ILLEGAL CONTRACT

25. California Civil Code § 1608 codifies the doctrine of illegality and provides that "[i]f any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." Under Civil Code § 1667, "unlawful" is broadly defined as that which is contrary to an express provision of law; contrary to the policy of express law, though not expressly prohibited; or, otherwise contrary to good morals. In determining illegality, the extent of enforceability and the remedy granted depends upon a variety of factors, including the policy of the transgressed law, the kind of illegality and the particular facts. (*Asdourian v. Araj* (1985) 38 Cal.3d 276, 282).

26. The consequences of an illegal contract can be harsh. Once a contract is deemed illegal and void, the court will refuse to enforce the contract and leave the parties as it finds them. (*Yoo v. Jho* (2007) 147 Cal.App.4th 1249, 1251. Illegality of contract also precludes the enforcement of attorney fee provisions in contracts. (*Id.* at 1256).

27. Illegality in a contract can be raised by any party or the Court even if it is not plead in the answer. As stated by the California Court of Appeals in *Fellom v. Adams* (1969) 274 Cal.App.2d 855, 863, "the court has both the power and duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of

1 what public policy forbids. It is immaterial that the parties, whether by inadvertence or
2 consent, even at the trial do not raise the issue.”

3 28. Defendant incorrectly presumes that the illegal contract cause of action is inappropriate;
4 conversely, Plaintiff clearly provides remedy for this by pleading in the alternative under
5 FRCP Rule 8(d)(2). (Macklin SAC, Pg. 26, Par. 29 – 30). Fed. R. Civ. Proc. 8(d)(2) permits
6 the use of alternate or hypothetical pleading if: by the nature of the circumstances the
7 Plaintiff would not know which allegations are right.

8 29. Plaintiff alleges that there is a *possible* contract relationship between Plaintiff and
9 Defendants, if found to be a valid contract. Plaintiff does not admit as to the veracity or
10 legality of the contract, however, Plaintiff pleads in the alternative to such a finding.

11 30. This type of hypothetical pleading is exactly what is contemplated under Rule 8(d)(2).
12 Macklin is forced to hypothecate based on the unknown decision by the court as to whether or
13 not the contract was ever legally formed. This forms the basis for a primary fact in Plaintiff’s
14 case. If the court were to determine the contract was valid, Plaintiff sufficiently pleaded
15 alternatively in the SAC.

16 31. Plaintiff has alleged sufficient facts, taken as true, and supported substantially by the
17 record, which form a valid cause of action. Should the court determine that the contract was
18 formed illegally, controlling case law dictates that the Breach of Contract cause would serve
19 as moot. Upon a finding of a void contract, the parties shall be returned to the position the
20 court finds them in prior to the contract being illegally formed. **See: Plaintiff’s SAC, Pg. 24,**
21 **Par. 21.** “Cal. Civil Code § 1668 provides that a contract that has as its object a violation
22 of law is “against the policy of the law.” Civil Code § 1667 states that “unlawful” is “1.
23 Contrary to an express provision of law; [¶] 2. Contrary to the policy of express law, though
24 not expressly prohibited; or, [¶] 3. Otherwise contrary to good morals.” (See also Civ. Code,
25 §§ 1441 [“A condition in a contract, the fulfillment of which is . . . unlawful . . . is void”],
26 1608 [“If any part of a single consideration for one or more objects, or of several
27 considerations for a single object, is unlawful, the entire contract is void”].) Plaintiff
28

1 sufficiently alleges that his income is a consideration of the formation of the contract". Even if
2 TILA were not controlling, which it undoubtedly is, California law also precludes Defendants
3 from disposing this cause of action. See: **Plaintiff's SAC; Illegal Contract; Mem. Of Pts. &**
4 **Auth., Mot. For Leave to Amend, Illegal Contract.**

5 UNLAWFUL DETAINER JUDGMENT

6 32. Defendant next turns to the Unlawful Detainer action as a purported authority under
7 which Macklin is deemed as precluded from bringing the instant causes of action. Defendant
8 is once again attempting to dissuade this court from actually viewing and adjudicating facts
9 that were never at issue in the Superior court's Unlawful Detainer decision.

10 33. It is well established that Unlawful Detainer is a summary proceeding where issues such
11 as Plaintiff's (TILA, Breach of Contract, ECOA) are, in fact, precluded from consideration.
12 See: "It is argued that the issue is not in the unlawful detainer action because title cannot be
13 tried in such a summary proceeding. Conceding that to be the general rule, it is not applicable
14 where the validity of the trustee's sale is attacked. If he has not pursued the terms of the trust
15 deed and the statute the trustee's deed passes only a vulnerable title. [3] "In an action for
16 unlawful detainer, section 1161a therefore necessarily requires proof that the property was
17 'duly sold in accordance with Section 2924 of the Civil Code,' and that 'the title under the sale
18 has been duly perfected.' (Italics ours.)". The Superior Court in Macklin's Unlawful Detainer
19 action, specifically refused to hear any argument as to the merits of the chain of title
20 documents, relying solely upon the recorded instruments as being valid...without ever hearing
21 the merits of the title issues or Federal claims. (*Seidell v. Anglo-California Trust Co.*, 55
22 Cal.App.2d 913, 920 [132 P.2d 12].) To same effect, see *Hewitt v. Justice's Court*, 131
23 Cal.App. 439, 443 [21 P.2d 641]; *Mortgage Guarantee Co. v. Smith*, 9 Cal.App. [174
24 Cal.App.2d 621] 2d 618, 619 [50 P.2d 835]; *Freeze v. Salot*, 122 Cal.App.2d 561, 564 [266
25 P.2d 140]; *Altman v. McCollum*, 107 Cal.App.2d Supp. 847, 856-857 [236 P.2d 914]; *Bliss v.*
26 *Security-First Nat. Bank*, 81 Cal.App.2d 50, 58 [183 P.2d 312].
27
28

1 34. Not one of the core causes of action here were ever heard by the lower court, thus, no
2 preclusion is appropriate. Rule 12(b)(6) motion is not applicable where there has never been
3 an adjudication of the facts in a prior action, especially when Defendants argued that Macklin
4 had no right to bring such facts. The record of the lower court speaks for itself.

5 **WITHDRAWAL OF BANKRUPTCY**

6 35. This argument has no merit whatsoever. Plaintiff easily dismisses this argument by
7 Defendant under the principals of *Stern v. Marshall*, *id.* The withdrawal, whether valid or not,
8 is not a factor in this motion. *Stern* defeats Defendants defenses under Rule 12(b)(6).

9 **DEFENDANTS LEGAL STANDARD ARGUMENT FAILS**

10 36. Defendant states (Def's MTD, MPA's, Pg. 17, Ln. 7-14): "Although the general rule in
11 resolving a Rule 12(b)(6) motion is to construe the complaint in the light most favorable to the
12 plaintiff and accept as true all well-pleaded factual allegations, *Cahill v. Liberty Mutual Ins.*
13 *Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996), a court is not required to accept as true "allegations
14 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re*
15 *Gilead Sciences Securities Lit.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).
16 Likewise, the court need not accept as true allegations that contradict facts which may be
17 judicially noticed by the court. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578
18 F.3d 1016, 1021-22 (9th Cir. 2009).

19 37. The above argument not only defeats Defendant's own arguments, the specific cases
20 repeatedly support Plaintiff's well-pleaded causes of action. In each of Plaintiff's causes of
21 action, Plaintiff has met his burden of pleading specific facts without ever reaching an
22 unwarranted deduction or unreasonable inference. The court may not deem any of the
23 judicially noticed documents proffered by Defendants as being true or factual in their recitals,
24 other than the fact that the documents exist or were recorded. Macklin sufficiently has
25 rebutted any presumption of truth throughout his pleadings before this court. The court's
26 record as provided by Defendants themselves, evidence the very facts that are in dispute.
27
28

1 When facts are in dispute, Rule 12(b)(6) does not offer a mechanism for Defendants to
2 summarily dismiss the Plaintiff's action.

3 38. Defendant cites to Federal Res Judicata standards (**Def's MTD, MPA's, Pg. 18, Ln. 12**
4 **- 16**) "Under California law, however, when determining the res judicata effect of a prior
5 federal court judgment, the court should apply federal standards. *Younger v. Jensen*, 26 Cal.3d
6 397, 411 (1980); *Levy v. Cohen*, 19 Cal.3d 165, 172-73; 4 B. Witkin, California Procedure,
7 Judgments, 156(b) (2d ed. 1971). Therefore, federal res judicata standards apply to determine
8 the preclusive effect of the prior Judgment in the Adversary Proceeding". The prior effect of a
9 federal court judgment (Bkrptcy) does not apply in this case [Emph. mine]. *Stern v. Marshall*,
10 *id.*, disposes of this theory, yet, Defendant continues to ignore the U.S. Supreme Court's
11 majority opinion in Defendant's attempt to fog the obvious.

12 39. Defendants admit that an Article I judge has issued rulings and dismissals of claims
13 (**Def's MTD, MPA's, Pg. 19, Ln. 25-26**): "Indeed, the Honorable Ronald Sargis considered
14 and rejected many of the exact same theories that Mr. Macklin now seeks to add to his SAC."
15 Again, without so much as an honorable mention, Defendants have completely set aside the
16 decisions made by Chief Justice Roberts in *Stern v. Marshall, id.* All claims made by Macklin
17 are substantively creatures of a contract. (**Plaintiff's Mot. For Leave to Amend, Ln. 24-25**):
18 "The Action arises out of a controversy of purported contract."

19 40. Defendant then relies on "privity" arguments as between Macklin and DBNTC. This
20 form of argument is not only dismissed by *Stern, id.*, but was argued in the opposite by
21 Defendant in the Bankruptcy Adversary Proceeding, vehemently. (**Def's MTD, MPA's, Pg.**
22 **22, Ln. 24**). "Here, there can be no doubt that there is privity between Mr. Macklin and
23 DBNT." Defendants specifically argued that Macklin was not in privity with DBNTC and
24 was precluded from invoking any rights under the Pooling & Servicing Agreement ("PSA").
25 After Defendant's argument, the court quantified the PSA as a "backroom deal" that Macklin
26 was not an intended third party beneficiary. Plaintiff has addressed this mis-concept in his
27 SAC by asserting an intended third party beneficial interest by virtue of the Step Transaction
28

1 Doctrine. (Plaintiff's SAC, Pg. 23, Ln. 12): "...the 'Step Transaction Doctrine' applies in
 2 this case". The step transaction doctrine originated from a common law principle in *Gregory*
 3 *v. Helvering*, 293 U.S. 465 (1935) that allowed the court to re-characterize a tax-motivated
 4 transaction.; "As early as 1938, the United States Supreme Court has indicated that "a given
 5 result at the end of a straight path is not made a different result because reached by following
 6 a devious path." *Commissioner v. Clark*, 489 U.S. 726, 738 (1989); (*Shuwa Investments Corp.*
 7 *v. County of Los Angeles* (1991) 1 Cal.App.4th 1635, 1648-1649. *Shuwa, supra*, at p. 1648.;
 8 *McMillin-BCED/Miramar Ranch North v. County of San Diego* (1995) 31 Cal.App.4th 545,
 9 556.).

10 41. Defendants made an election of special treatment under the Internal Revenue Laws of
 11 the United States at I.R.C. Rule 860D et. seq. (See: Plaintiff's Exhibit 3, Pooling &
 12 Servicing Agreement – Election of REMIC). Defendant's REMIC trust election is a tax
 13 motivated transaction that necessarily involved Macklin's loan as a purported asset of the tax
 14 structured trust, or, "REMIC" (Real Estate Mortgage Investment Conduit). Plaintiff has
 15 sufficiently alleged that the series of transactions in forming the corpus of the trust relied
 16 upon, were interdependent upon, and resulted in the transactions, including Macklin's loan
 17 transaction, being qualified under the Doctrine, *id.* The trust, as purported beneficiary to
 18 Macklin's debt obligation and payment stream, enjoys a special tax free status under the
 19 special moniker of "REMIC".

20 42. This set of facts clearly shows that Defendant has failed to carry its burden of proving
 21 that no controversy exists, or that Macklin has failed to allege facts sufficient to support his
 22 claims. Rule 12(b)(6) cannot dispose of any of the claims.

23 BREACH OF CONTRACT/NOTICE OF DEFAULT

24 43. *Generes v. Justice Court* (1980) 106 Cal.App. 3d 678; *People v. Baender* (1924) 68
 25 Cal.App. 49. "Every person who files a false or forged document or instrument with the
 26 County Recorder that affects title to, or places an encumbrance on, or places an interest
 27 secured by a mortgage or deed of trust on, real property....with knowledge that the document
 28

1 is false or forged is punishable by statute Cal.Pen.Code 115.5(a). Defendants DBNTC, SPS
2 and Quality loan Services, Inc. ("QLS") all participated in the execution of a false instrument.
3 Under the language used in all instruments exhibited and evidenced by Defendants, DBNTC
4 instructed Defendants SPS and QLS to execute and record the instruments against Plaintiff's
5 interests.

6 44. The face of the NOD instrument states: "That by reason thereof, the present beneficiary
7 under such deed of trust, has executed and delivered to said duly appointed trustee, a written
8 Declaration of Default.." (DOC No. 47-8, Exhibit D, Def's BK Exhibits from BK Adv.
9 Pro.). This statement is what it purports to be in the instrument, a "Declaration". Yet, no
10 evidence has ever been brought by Defendants that would support the recitals contained in the
11 instrument. See: *Tomczak v. Ortega* 50 Cal. Rptr. 20, 240 Cal. App. 2d 902, "no substantial
12 evidence to support such recital" was found and the notice of default and subsequent trustee's
13 deed upon sale were determined as void and of no legal effect." See: *Wolfe v. Lipsy* (App. 2
14 Dist. 1985) 209 Cal.Rptr. 801, 163 Cal.App.3d 633. Quieting Title 34(5); *Angell v. Superior*
15 *Court* (Verdugo Trustee Service Corp.) (1999) 73 Cal. App. 4th 691 [86 Cal Rptr. 2d 657].

16 45. In *City of Los Angeles v. Morgan*, 105 Cal. App. 2d 726 (1951) the court stated: "the
17 purpose of the recording statutes is to provide notice...whether valid or invalid...if invalid
18 instruments are recorded, no notice is given." Because Plaintiff alleges sufficiently that there
19 was no default, as described and defined in the Notice of Default ("NOD"), and no evidence
20 to support the recitals contained in the NOD has been proffered by Defendants, Defendants
21 are without any authority to have executed the instrument. Defendants have had years to
22 produce this evidence, without even a scintilla of proof of the recitals. Defendants shall have
23 such an opportunity in discovery in this case.

24 46. Defendants are also misinformed in their representations to this court (Def's MTD,
25 MPA Pg. 25, Ln. 22-27): "First, Mr. Macklin's allegations are contradicted by judicially
26 noticeable facts. The Placer County Recorder's Office shows that Accredited Home Lenders,
27 Inc. provided Mr. Macklin a Notice of Default stating that Mr. Macklin was in default of his
28

1 obligation and providing him more than 30 days to pay the delinquent amount before the
2 remaining obligation would be accelerated and the Property would be sold". (RJN, ¶ 6)
3 "There was no breach of the Deed of Trust." This statement presumes truth in the recitals in
4 the NOD. Plaintiff has rebutted that presumption timely.

5 47. Specifically, at sec. 22 of the Macklin Deed (**Bleicher Decl., DOC 45-2, Ex. 2, Deed of**
6 **Trust**), it states "Lender shall give notice to borrower, **prior to acceleration** following
7 borrower's breach of any covenant or agreement... the notice shall further inform borrower of
8 the right...to bring a court action to assert the non-existence of a default or any other defense
9 of borrower." The contract specifically states that borrower is entitled to notice of his right to
10 assert the non-existence of a default **prior to the acceleration.**

11 48. The NOD clearly and unambiguously declares the acceleration of the debt by stating:
12 "...has declared and does hereby declare all sums secured thereby immediately due and
13 payable and has elected to cause the trust property to be sold..." Borrower, Macklin, never
14 received any notice of his right to assert the non-existence of a default. Borrower Macklin also
15 never received any notice of any alleged default prior to this NOD being filed against him.
16 This is a material breach of the contract by Defendants. Borrower was entitled to 30 days'
17 notice **prior to the acceleration, the acceleration is contained within the NOD.** Because
18 there was a material breach by Defendants prior to any valid allegation of breach by Plaintiff,
19 Defendants were precluded from demanding performance against Macklin until their material
20 breach was cured. MILLER & STARR, supra note 249, § 10:5. "Moreover, because a deed of
21 trust is a contract, the courts will construe it, together with the note and any agreement of sale,
22 using rules of contract interpretation".

23 49. "It is elementary that one party to a contract cannot compel another to perform while he
24 himself is in default. While the performance of an allegation can be satisfied by allegations in
25 general terms, excuses must be pleaded specifically" *Durell v. Sharp Healthcare* (2010) 183
26 Cal. App. 4th 1350, 1367. The Motion fails to allege an excuse for non-performance by
27 Defendants, thus, the Motion fails.
28

1 50. Furthermore, because the Defendants did not, and still do not, have any admissible
2 evidence to support the recitals contained in the NOD (*Tomczak, id.*), the NOD is not
3 privileged under Cal. Civ. Code § 47 (a) or (b), it is a qualifiedly privileged communication
4 with malice and is considered as “unprivileged” under Cal. Civ. Code § 47(c). *Kachlon v.*
5 *Markowitz* (2008) 168 CA4th 316, 85 CR3d 532 applies here (applying qualified privilege for
6 slander of title against foreclosing trustee). ... the notice is not privileged and is an
7 unprivileged communication with malice.

8 51. Defendants are again misplaced in their assertions that “judicially noticeable facts”
9 contradict anything in this record (**Def’s MTD Pg. 25, Ln. 22**). There are no judicially
10 noticeable facts from which Defendants may draw any factual reference against Macklin,
11 particularly when the records themselves contradict Defendant’s positions at every turn. The
12 NOD has been repudiated as to its recitals and there exists a factual dispute. Rule 12(b)(6)
13 does not allow for such a dismissal.

14 52. Macklin’s “admissions” as to ceasing payments to Accredited does not manifest a
15 breach, admission or a default in the contract. Defendants had a duty to answer Macklin’s
16 request for debt validation and a beneficiary statement under Cal. Civ. Code § 2943. Those
17 requests went unanswered, thus, no default may arise when Defendants breached their own
18 duties first. (See: Doctrine of First Material Breach). Even if Macklin had not requested the
19 answers from the lender, the lender still owed a contractual duty of 30 days’ notice of a right
20 to assert the non-existence of a default prior to executing and recording the NOD by contract.

21 53. The trustee’s authority to exercise the power of sale is subject to the beneficiary’s
22 express declaration of default and instructions to the trustee to sell the property. CAL. CIV.
23 CODE §§ 2924(a)(1)(B)–(C) (Deering Supp. 2012) (permitting the notice of default to be
24 recorded by the trustee, mortgagee, beneficiary, or an authorized agent but stating that it is the
25 beneficiary who elects to sell the property and who provides the information in the default
26 notice that a breach of an obligation for which the deed of trust is security has occurred and
27 the nature of each breach); *Glaski*, 160 Cal. Rptr. 3d at 453 [observing that the “lender-
28

1 beneficiary” decides whether to pursue non-judicial foreclosure under the deed of trust used
2 by the parties in this case]; see also 4 HARRY D. MILLER & MARVIN B. STARR,
3 MILLER & STARR CALIFORNIA REAL ESTATE § 10:4 (3d ed. 2000). No such
4 admissible evidence is before this court that supports the contention the beneficiary ever
5 instructed the servicer or the trustee to act. Macklin has alleged that no such evidence of this
6 fact exists. A dispute as to those facts is present.

7 54. Counsel’s characterization of a breach of sec. 22 of the deed as “immaterial” sounds
8 hollow and cannot stand as testimony. One cannot admit a breach and then dismiss it by
9 stating that it was immaterial. (Def’s MTD, Pg. 26, Ln. 14-15.). The contract must be
10 construed liberally in favor of Plaintiff and strictly against Defendants.

11 **EQUAL CREDIT OPPORTUNITY ACT (ECOA)**

12 55. *Schlegel v Wells Fargo Bank* (9th Cir. July 3, 2013). The 9th Circuit panel agreed that the
13 acceleration of appellant’s debt (the notice of default) constituted a revocation or material
14 alteration of a consumer debt and thus met the definition of adverse action under the ECOA.

15 56. Defendants are again incorrect when they assert that Macklin does not state a claim
16 under ECOA, rather, Plaintiff has sufficiently and factually met his burden of pleading facts
17 that support this claim. The NOD was executed by Defendants, and it constitutes a revocation
18 or material alteration of a consumer’s debt. Defendants use of *Gorham-DiMaggio v.*
19 *Countrywide Home Loans, 13 Inc.*, N.D.N.Y.2008, 592 F.Supp.2d 283, affirmed 421
20 Fed.Appx. 97, 2011 WL 1681998, is not controlling in any way here. *Schlegel* binds
21 Defendants.
22

23 57. Rule 12(b)(6) is not appropriate and Defendant cannot invoke its privileges, there is a
24 material fact dispute regarding the Notice of Default and the ECOA does offer relief to
25 Macklin.

26 **FAIR CREDIT REPORTING ACT (FCRA)**

1 58. Defendants once again rely upon res judicata argument here which has been
2 exhaustively argued, *id.* For the purposes of judicial economy, Plaintiff incorporates his
3 argument regarding res judicata and estoppel to apply to this defense as well. The fact of
4 default has always been disputed by Macklin and this fact is not overcome by use of res
5 judicata or claim preclusion by Defendants.

6 59. Defendants defense is not allowed under Rule 12(b)(6) here. There are material facts in
7 dispute.

8 UCL/ BUSINESS & PROFESSIONS CODE 17200

9
10 60. Defendants here again attempt to sidetrack the court. The allegation of legislatively
11 violative practices are throughout Plaintiff's Complaint. A simple, thorough reading of
12 Macklin's Complaint clearly establishes each and every unlawful act, the laws it violates,
13 and the roles of each Defendant. It is apparent that Defendants do not understand the well-
14 established rule of law that when one buys a pig, the stink comes with it.

15 CONCLUSION

16 Defendants had a duty to convince this court that there were no triable issues of fact and
17 no disputes of those facts. Defendants have failed in this attempt at a quasi-summary
18 judgment styled as a Rule 12(b)(6) Motion.

19 Macklin alleges that his contract is void. The contract was formed by the use of false
20 means, an undisputed fact.

21 Defendants stand in the shoes of their predecessor(s) in interest as a matter of law and
22 carry full liability.

23 Macklin sufficiently alleged TILA violations and timely rescission. Those facts are
24 disputed by Defendants.

25
26 Macklin alleged facts as to Breach of Contract sufficient to go beyond the realm of
27 "speculation" by exhibiting unrefuted documents with facts in dispute.
28

1 Macklin sufficiently states claims on all causes of action with specificity and clarity,
2 Defendants ask this court to dismiss before any discovery can be made. Defendants are
3 perilously incorrect in their attempts to ignore the United States Supreme Court decisions
4 and the CFPB's authority to promulgate their own Rules.

5 Defendants make statements against interest in their quest to provide a system of smoke
6 and mirrors, hoping that the court won't look under the hood. The court is bound by a
7 duty to effectuate justice, no matter the names of the Defendants, albeit a bank or
8 servicing agent.

9 The court should deny the Defendants Motion to Dismiss with prejudice and commence
10 full discovery as to the factual dispute herein.
11
12
13

14 Respectfully Submitted,

/s/ James Macklin

James Macklin, Defendant in Pro Se

EXHIBIT L

EXHIBIT L

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES L. MACKLIN,

Plaintiff,

v.

MATTHEW HOLLINGSWORTH, et al.,

Defendants.

Case No. 2:10-cv-1097-MCE-KJN PS

**DEFENDANTS SELECT PORTFOLIO
SERVICING, INC., AND DEUTSCHE
BANK NATIONAL TRUST CO.'S REPLY
IN SUPPORT OF MOTION TO DISMISS
THE SECOND AMENDED COMPLAINT**

Date: August 21, 2014
Time: 10:00 a.m.
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Judge: Hon. Kendall J. Newman

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I. INTRODUCTION

Through his far-ranging and often incomprehensible opposition, Mr. Macklin fails to demonstrate a single legitimate ground to prevent this Court from once again dismissing Mr. Macklin's claims. Rather, Mr. Macklin's opposition confirms that the underlying dispute – and indeed the same causes of action – was thoroughly litigated to conclusion in the bankruptcy court. Mr. Macklin's attempts to dismiss the consequences of those proceedings, which he initiated, expressly consented to, and defended as jurisdictionally appropriate, are based on a fundamental misunderstanding of the bankruptcy court's power to enter final judgments and this Court's ability to cure any defects in that procedure. Once this threshold issue is resolved, the path is clear for this Court to preclude Mr. Macklin from re-litigating his claims against Deutsche Bank National Trust Company ("DBNT") and Select Portfolio Servicing, Inc. ("SPS").

Even if Mr. Macklin could re-litigate his claims, the Court should not ignore the thorough and thoughtful analysis of the Honorable Ronald Sargis when he determined that Mr. Macklin had not – and could not – state a claim for relief based on the undisputed facts in this case. Mr. Macklin's latest – and *seventh* – attempt to plead a cognizable claim against DBNT and SPS fares no better. Mr. Macklin is bound by the facts of his claims. These facts establish that he unreasonably delayed bringing his claims against DBNT and SPS, that DBNT and SPS did not commit the allegedly unlawful acts and did not succeed to any third party who did, that Mr. Macklin lacks standing, and that Mr. Macklin cannot claim the benefit of later enacted legislation. DBNT and SPS request that the Court put an end to Mr. Macklin's relentless vendetta.

II. ARGUMENT

A. The bankruptcy court judgment is a final judgment for purposes of res judicata.

Mr. Macklin argues that res judicata does not apply here because of the constitutional limit on the ability of a bankruptcy court – an Article I court – to issue a final judgment on matters that are properly reserved for Article III courts. (Opposition, 2:20-25; 3:11-15; 13:6-9) In support of this argument, Mr. Macklin cites to the Supreme Court's decision in *Stern v. Marshall*, 131 Sup. Ct. 2594 (2011). Mr. Macklin's reliance on *Stern v. Marshall* is misplaced.

Since the Supreme Court's decision in *Stern*, a series of decisions both clarified and

1 limited its impact. Relevant here, the Ninth Circuit and the Supreme Court have recognized two
2 exceptions to the general rule that a bankruptcy court lacks the ability to enter final orders and
3 judgments. First, a bankruptcy court may enter a final judgment where the party against whom
4 judgment is entered consented to the bankruptcy court's authority. Second, the bankruptcy
5 court's judgment may be treated as findings of fact and conclusions of law subject to the *de novo*
6 review under the "non-core" statutory scheme.

7 The relevant authority for these two principles is the Ninth Circuit's decision in *In re*
8 *Bellingham Ins. Agency*, 702 F.3d 553 (9th Cir. 2012) and the Supreme Court's review of that
9 decision in *Executive Benefits Insurance Agency v. Arkison*, Case No. 12-1200, 573 U.S. ____
10 (2014). In *Bellingham*, the bankruptcy trustee initiated an adversary proceeding to pursue
11 fraudulent conveyance claims against Executive Benefits Insurance Agency ("EBIA") and other
12 defendants. The trustee ultimately filed a motion for summary judgment in the bankruptcy court.
13 The bankruptcy court granted summary judgment on the fraudulent conveyance claims. EBIA
14 appealed the grant of summary judgment to the district court, which affirmed the bankruptcy
15 court's decision after a *de novo* review of the summary judgment ruling.

16 EBIA appealed again to the Ninth Circuit. Following the Supreme Court's decision in
17 *Stern v. Marshall*, discussed *infra*, EBIA moved to have the appeal dismissed on grounds that
18 Article III of the United States Constitution did not permit the bankruptcy court to issue a final
19 judgment on the underlying fraudulent conveyance claims. The Ninth Circuit denied EBIA's
20 motion.

21 In denying the motion, the Ninth Circuit held that there are two independent grounds for
22 upholding the finality of the judgment entered by the bankruptcy court. First, while Article III
23 does not permit a bankruptcy court to enter a fraudulent conveyance claim against a noncreditor
24 without consent of the parties, EBIA had *impliedly consented* to the bankruptcy court's
25 adjudication in bankruptcy case.

26 As a second and independent grounds for denying EBIA's motion, the Ninth Circuit held
27 that, even if EBIA had not consented to the bankruptcy court's entry of a final judgment, any
28 procedural defects in the judgment were cured upon the district court's *de novo* review and

1 affirmation of the bankruptcy court's grant of summary judgment, which is the same standard of
2 review applied to a bankruptcy court's proposed findings of fact and conclusions of law under the
3 "non-core" statutory scheme.

4 EBIA appealed yet again, this time to the Supreme Court, and the Supreme Court granted
5 certiorari. *Executive Benefits Insurance Agency v. Arkison*, Case No. 12-1200, 573 U.S. ____
6 (2014). In its decision, the Supreme Court declined to address the issue of consent, electing
7 instead to resolve the case on the basis of the district court's *de novo* review. In particular, the
8 Supreme Court said:

9 We hold today that when, under *Stern*'s reasoning, the Constitution
10 does not permit a bankruptcy court to enter final judgment on a
11 bankruptcy-related claim, the relevant statute nevertheless permits a
12 bankruptcy court to issue proposed findings of fact and conclusions
13 of law to be reviewed *de novo* by the district court. Because the
14 District Court in this case conducted the *de novo* review that
15 [EBIA] demands, we affirm the judgment of the Court of Appeals
16 upholding the District Court's decision.

17 This procedure allows the district court to avoid potential uncertainty associated with a
18 bankruptcy court's adjudication of any claims by conducting its own *de novo* review:

19 As we explain in greater detail below, when a bankruptcy court is
20 presented with such a claim, the proper course is to issue proposed
21 findings of fact and conclusions of law. The district court will then
22 review the claim *de novo* and enter judgment. This approach
23 accords with the bankruptcy statute and does not implicate the
24 constitutional defect identified by *Stern*.

25 Importantly, the Supreme Court found that there was no statutory gap under *Stern* since it
26 was able to reconcile the district court's review with an existing severability provisions calling for
27 *de novo* review of non-core claims:

28 The plain text of this severability provision closes the so-called
"gap" created by *Stern* claims. When a court identifies a claim as
a *Stern* claim, it has necessarily "held invalid" the "application" of
§157(b)—i.e., the "core" label and its attendant procedures—to the
litigant's claim. Note following §151. In that circumstance, the
statute instructs that "the remainder of th[e] Act . . . is not affected
thereby." *Ibid*. That remainder includes §157(c), which governs
non-core proceedings. With the "core" category no longer
available for the *Stern* claim at issue, we look to §157(c)(1) to
determine whether the claim may be adjudicated as a non-core
claim—specifically, whether it is "not a core proceeding" but is

1 “otherwise related to a case under title 11.” If the claim satisfies
2 the criteria of §157(c)(1), the bankruptcy court simply treats the
3 claims as non-core: The bankruptcy court should hear the
proceeding and submit proposed findings of fact and conclusions of
law to the district court for *de novo* review and entry of judgment.

4 Addressing the issue of consent which formed one of the alternate bases in the Ninth
5 Circuit’s opinion, the Supreme Court expressly “reserve[d] ... for another day” whether Article
6 III permits a bankruptcy court to enter final judgment on a *Stern* claim with the consent of the
7 parties. Accordingly, the Supreme Court elected not to disturb the Ninth Circuit’s decision with
8 regard to the issue of consent.

9 Thus, while Mr. Macklin correctly identifies the issues presented by *Stern*, his opposition
10 disregards subsequent decisions that filled in some of the perceived gaps created by *Stern*. Had
11 Mr. Macklin done so, he would have come to understand that the problems identified in *Stern* can
12 be cured through consent and *de novo* review.

13 **1. Mr. Macklin consented to the bankruptcy court’s authority to enter a final**
14 **judgment.**

15 Following the *Executive Benefits* decision, the law in the Ninth Circuit remains that a
16 party to a contested bankruptcy matter may consent to the bankruptcy court’s authority to enter a
17 final order or judgment. *See In re Bellingham*. This consent may be express or implied. *Id.*
18 (finding that debtor’s filing of a voluntary bankruptcy case constituted implied consent). To
19 remove any uncertainty regarding this issue of consent, some Ninth Circuit bankruptcy courts
20 revised their local rules to **require** the pleader to state whether or not it consents to entry of final
21 orders and judgments. *See, e.g.,* United States Bankruptcy Court, District of Nevada, Local
22 Bankruptcy Rule 9014.2.

23 Here, Mr. Macklin unequivocally and expressly consented to the bankruptcy court’s entry
24 of final orders and judgments. In his Adversary Complaint, Mr. Macklin pleaded that the
25 adversary proceeding was a core proceeding, **and** that, “[t]o the extent this proceeding is
26 determined to be a non-core proceeding, [Mr. Macklin] **consents to the entry of final orders or**
27 **judgment by the bankruptcy court.**” [Complaint, ¶ 3]. In his First Amended Complaint,
28 Mr. Macklin again pleaded: “Plaintiff consents to the entry of final order or judgment by the

1 bankruptcy court.” [First Amended Adversary Complaint, ¶ 2]. Mr. Macklin’s proposed Second
2 Amended Complaint contained identical allegations. Moreover, even if Mr. Macklin had not
3 expressly consented to the bankruptcy court’s authority by filing the voluntary bankruptcy case
4 and filing the Adversary Proceeding against DBNT, Mr. Macklin both expressly and *impliedly*
5 consented to the bankruptcy court’s authority. *See In re Bellingham*. There can be no doubt that
6 Mr. Macklin consented to the bankruptcy court’s ability to enter final orders and judgments. The
7 bankruptcy court did exactly what Mr. Macklin asked it to do. Mr. Macklin cannot seek to
8 relieve himself of the final judgment after the fact merely because he does not like the outcome.

9 The current state of Ninth Circuit jurisprudence provides that Mr. Macklin’s express and
10 implied consent satisfies whatever jurisdictional gaps were left over from *Stern*. Although the
11 Supreme Court may resolve a circuit split on this issue next term, *see Wellness Int’l Network Ltd.*
12 *v. Sharif*, 272 F.3d 751 (7th Cir. 2013), cert. granted, ___ U.S.L.W. ___ (U.S. Jul. 1, 2014) (No. 13-
13 9355, this Court is bound to follow controlling precedent. That precedent provides that Mr.
14 Macklin consented to the bankruptcy court’s ability to enter a final judgment. Mr. Macklin
15 cannot now escape the consequences of his prior consent.

16 **2. This Court may elect to treat the bankruptcy court judgment as proposed**
17 **findings of fact and conclusions of law subject to *de novo* review.**

18 Even if Mr. Macklin had not consented to the bankruptcy court’s ability to enter the
19 Judgment, this Court may still cure any *Stern* defects by treating the Judgment as proposed
20 findings of fact and conclusions of law under the procedure set forth in Section 157. *See*
21 *Executive Benefits*. Should the Court elect to conduct such a *de novo* review of the Judgment, the
22 Court could undisputedly enter a final judgment.

23 In *Executive Benefits*, the Chapter 7 trustee brought an action against EBIA to recover
24 assets transferred to EBIA under the theory the transfers were fraudulent conveyances. Following
25 a dispute regarding the appropriate forum—bankruptcy court or district court—to resolve the
26 fraudulent conveyance claim, the trustee moved for summary judgment in the bankruptcy court.
27 The bankruptcy court granted the motion, and EBIA appealed to the district court. The district
28 court reviewed the bankruptcy court’s decision to grant summary judgment *de novo*; the district

1 court affirmed.

2 On appeal to the Ninth Circuit, the Court of Appeal affirmed. The Supreme Court granted
3 certiorari to resolve a question left unanswered in *Stern*. That question was whether the existing
4 procedure under Section 157(c)(1) for a district court to refer cases or proceedings arising under
5 the Bankruptcy Code to bankruptcy judges solved the *Stern* court's concerns that only Article III
6 courts were constitutionally able to finally adjudicate core proceedings. The Supreme Court
7 concluded that this procedure was constitutionally sufficient where the district court conducted a
8 *de novo* review.

9 Here, however, there was no such review following the bankruptcy court's grant of
10 summary judgment. Unlike EBIA, Mr. Macklin decided to not seek district court *de novo* review,
11 electing instead to appeal the Judgment to the Ninth Circuit Bankruptcy Appellate Panel
12 ("BAP").¹ Mr. Macklin's appeal was untimely, thereby divesting the BAP of jurisdiction. But
13 Mr. Macklin's decision to not appeal the Judgment to the district court, where the Judgment
14 would have been subject to *de novo* review, does not allow him to now avoid the effects of res
15 judicata. That is because, just as a district court could have treated the Judgment as findings of
16 fact and conclusions of law under Section 157 upon an appeal from the Judgment,² so too can this
17 Court treat the Judgment as findings of fact and conclusions of law. Accordingly, DBNT and
18 SPS respectfully request that, in an abundance of caution and to preserve the issue for appeal, the
19 Court conduct a *de novo* review of the bankruptcy court's Judgment.

20 **3. Mr. Macklin fails to respond to SPS's privity argument.**

21 Having established no less than two grounds for finding the bankruptcy court's Judgment
22 to constitute a final judgment for purposes of res judicata, the sole issue is whether Mr. Macklin,
23 DBNT and SPS were parties or in privity with parties to the action resulting in the Judgment.

24 In his opposition, Mr. Macklin appears to argue that there was no contractual privity
25 between him and defendants DBNT and SPS. [Opposition, 14:19-15:9] Mr. Macklin

26 ¹ There can be little doubt that, had the bankruptcy court and DBNT had the benefit of the *Executive*
27 *Benefits* decision, they too would have sought district court *de novo* review under Section 157.

28 ² See also *Winters v. State Farm Fire and Cas. Co.*, 73 F.3d 224 (9th Cir. 1995) (review of grant of
summary judgment is entitled to *de novo* review).

1 misunderstands the type of privity contemplated by the doctrine of res judicata.

2 “‘Privity’—for the purposes of applying the doctrine of *res judicata*—is a legal
3 conclusion “designating a person so identified in interest with a party to former litigation that he
4 represents precisely the same right in respect to the subject matter involved.” *In re Schimmels*,
5 127 F.3d 875, 881 (9th Cir. 1997) (citing *Southwest Airlines Co. v. Texas International Airlines*,
6 *Inc.*, 546 F.2d 84, 94 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) (citing *Jefferson School of*
7 *Social Science v. Subversive Activities Control Board*, 331 F.2d 76 (D.C.Cir.1963))).

8 Mr. Macklin and DBNT were parties to the Adversary Proceeding. DBNT may clearly
9 invoke the doctrine of res judicata to preclude Mr. Macklin from re-litigating these claims. In its
10 moving papers, SPS argues that it too may seek the benefit of the Judgment because it was in
11 privity with DBNT. Mr. Macklin does not dispute this anywhere in his opposition. To the
12 contrary, his opposition consistently lumps together “defendants” as a single actor perpetrating
13 the allegedly unlawful conduct that forms the basis of his claims.

14 DBNT and SPS have demonstrated that the Judgment is a final judgment for purposes of
15 res judicata. Mr. Macklin consented to the bankruptcy court’s entry of a final judgment and this
16 Court may cure any perceived defects through its own *de novo* review of that Judgment. Mr.
17 Macklin is not entitled to another bite at the apple. The claims in the Second Amended
18 Complaint are precluded.

19 **B. Mr. Macklin otherwise fails to explain how he could cure the defects in his Second**
20 **Amended Complaint.**

21 Even if Mr. Macklin’s claims against DBNT and SPS were not precluded, the Court still
22 could not allow the defective claims in the Second Amended Complaint to proceed. Mr. Macklin
23 still has not been able to state a claim upon which relief may be granted. To the contrary, the
24 Second Amended Complaint contains numerous omissions of critical facts that must be pled to
25 state cognizable claims and discloses incurable defenses to Mr. Macklin’s ability to proceed on
26 his causes of action. The Second Amended Complaint is fatally flawed.

1 **1. Mr. Macklin does not explain how the defense of illegality of contract states a**
2 **claim upon which relief may be granted.**

3 Mr. Macklin stubbornly clings to his illegal contract cause of action despite citing to
4 authority that illegality of contract is a defense to a claim to enforce a contract. Mr. Macklin does
5 not explain how he may turn this defense into a claim for relief. [Opposition, 10:11-12:4] While
6 DBTNC and SPS are reluctant to assume Mr. Macklin's arguments in opposition, it is possible
7 that Mr. Macklin is attempting to plead a claim for declaratory relief declaring the lending
8 documents void. If this assumption is correct, Mr. Macklin still would not plead a claim for relief
9 for several reasons.

10 First, it is well settled that a court may decline to address a claim for declaratory relief
11 when the controversy has ripened into an actual claim for relief. *Tina v. Countrywide Home*
12 *Loans, Inc.*, 2008 WL 4790906, at *2 (S.D.Cal. Oct.30, 2008) (quoting *Tempco Elec. Heater*
13 *Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 749 (7th Cir.1987)). This undoubtedly occurred five
14 years ago when DBNT declared Mr. Macklin in default and initiated foreclosure proceedings.
15 Second, even if Mr. Macklin could prove that the loan and security agreements were void, it
16 would not be possible to return the parties to their pre-contract positions. As the Second
17 Amended Complaint and judicially noticeable facts make clear, DBNT has already foreclosed on
18 the Property.

19 **2. Mr. Macklin's does not allege a material breach of the Deed of Trust.**

20 In support of his breach of contract claims, Mr. Macklin depends on a hyper-technical
21 interpretation of the nonjudicial foreclosure process by which DBNT and its agents must have
22 provided him with a notice of default and acceleration before serving the statutory notice of
23 default. [Opposition, 17:5-22] Mr. Macklin admits that any technical defect in the foreclosure
24 process and loan acceleration did not rise to the level of a material breach.

25 Under California law, the materiality of a breach is normally a question of fact. *See*
26 *Plotnik v. Meihaus*, 208 Cal. App. 4th 1590, 1602-03 (2012) (citing *Brown v. Grimes*, 192 Cal.
27 App. 4th 265, 277 (2011)). "However, if reasonable minds cannot differ on the issue of
28 materiality, the issue may be resolved as a matter of law." *Insurance Underwriters Clearing*

1 *House, Inc. v. Natomas Co.*, 184 Cal. App.3d 1520, 1526-27 (1986). Whether a partial breach of
2 a contract is material depends on “the importance or seriousness thereof and the probability of the
3 injured party getting substantial performance.” 1 Witkin, Summary of Cal. Law (10th ed. 2005)
4 Contracts, § 852, pp. 938–940; *see also Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal.
5 App. 3d 1032, 1051 (1987); *Sackett v. Spindler*, 248 Cal. App. 2d 220, 229 (1967).

6 Here, Mr. Macklin alleges that he “decided” to stop making payments because (in his
7 opinion) his payment of the obligation under the deed of trust would not result in a default.
8 Mr. Macklin essentially admits that, he decided to implement a strategic course of conduct due to
9 the fact that the lender had taken out insurance on the loan when it was put into the REMIC.
10 [SAC, ¶ 16] Mr. Macklin further admits that, following receipt of the Notice of Default, he did
11 not attempt to cure or dispute the default. Consequently, irrespective of the alleged defect, the
12 outcome remained the same —default due to Mr. Macklin’s decision not to make his mortgage
13 payments. When the occurrence or non-occurrence of an event does not change the outcome,
14 then that breach is not material as a matter of law, and the Court can resolve the issue on a motion
15 to dismiss. Mr. Macklin has failed to allege that DBNT or SPS materially breached the Deed of
16 Trust by failing to provide Mr. Macklin prior notice before the Notice of Default.

17 **3. Mr. Macklin does not demonstrate an adverse action under ECOA.**

18 Mr. Macklin argues that the Ninth Circuit has declared the service of a Notice of Default
19 and acceleration of debt to be an adverse action under the ECOA. In support of his position,
20 Mr. Macklin cites to *Schlegel v. Wells Fargo Bank, N.A.*, 720 F.3d 1204, 1211 (9th Cir. 2013).
21 Mr. Macklin’s reliance on *Schlegel* is misplaced.

22 In *Schlegel*, the plaintiff received a loan from defendant Wells Fargo, but fell behind on
23 his payments. *Id.* at 1206. Wells Fargo proposed a loan modification *extending the maturity*
24 *date of the loan*, which plaintiff accepted. *Id.* For the next six months, Wells Fargo repeatedly
25 sent default notices and denied that the loan was modified. *Id.* at 1207. Plaintiff diligently
26 attempted to clarify that his modification was complete, but to no avail. Wells Fargo eventually
27 acknowledged that the default notices sent to plaintiff were erroneous, but the Ninth Circuit held
28 that defendant’s “prolonged non-responsiveness, and its affirmative statements regarding loan

1 acceleration and default ... plausibly gave rise to the claim that [defendant] terminated the loan
2 modification agreement and thereby revoked the [plaintiffs'] credit for purposed of § 1691(d)(6).”
3 *Id.* at 1211.

4 The *Schlegel* court ultimately held that the complaint pled sufficient facts to allege that
5 defendant took adverse action on plaintiffs' loan modification application, thereby requiring Wells
6 Fargo to supply a statement of reasons. *Id.* Central to this holding was the Ninth Circuit's broad
7 interpretation of ECOA so as to define a “revocation of credit” as including the annulling,
8 repealing, rescinding or *canceling a right to defer payment of a debt*. *Id.*; see also *Murfitt v.*
9 *Bank of Am. NA*, EDCV 13-01182 JGB, 2013 WL 7098636 (C.D. Cal. Oct. 22, 2013) (holding
10 that failure to acknowledge previously agreed upon deferment of loan as part of a modification).

11 Here, Mr. Macklin does not allege that he obtained, let alone requested, a loan
12 modification. There is no allegation that defendants DBNT or SPS agreed to defer payment of
13 the debt. Under these situations, where the loan is due and payable, and the debtor *admits* that he
14 was in default on *his* obligation to pay, the notice of default is not an adverse action. See
15 *Rockridge Trust v. Wells Fargo, N.A.*, — F.Supp. —, 2013 WL 5428722, at *17 (N.D. Cal.
16 2013) (“Here, in the fall of 2009, [plaintiff] sought an extension of credit, a loan modification,
17 while he was delinquent in payments on initial credit arrangement, his mortgage loan. In these
18 circumstances, there was no “adverse action” within the meaning of the ECOA. To the extent that
19 a new credit agreement was granted and then revoked, the allegations in the FAC show that
20 Shahani received written notice of the *denial* of his loan modification application within thirty
21 days of its submission”).

22 **4. Mr. Macklin does not cure the defects in his FCRA cause of action.**

23 Mr. Macklin does not attempt to respond to the defects addressed in defendants' motion to
24 dismiss, other than to argue that res judicata does not apply to his FCRA cause of action. As
25 discussed above, res judicata does apply to all of Mr. Macklin's claims. Even if it did not,
26 Mr. Macklin's admission that he was in default when he stopped making payments on the
27 obligation in December 2008 negate a necessary element of his claim. DBNT and SPS request
28 that the Court dismiss this cause of action.

1 **5. Mr. Macklin's TILA claims fail.**

2 **a. Mr. Macklin's Section 1635 TILA claim is a nonstarter.**

3 Mr. Macklin argues that the Court may not ascertain the sufficiency of his alleged notice
4 of rescission on this motion to dismiss. Mr. Macklin is mistaken for several reasons.

5 First, as addressed above and in its moving papers, the Honorable Ronald Sargis
6 determined this issue in connection with his order dismissing the First Amended Adversary
7 Complaint as adopted in his final Judgment. That Mr. Macklin did not rescind his loan has been
8 established as an ultimate fact, and Mr. Macklin is collaterally stopped from arguing otherwise.
9 *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

10 Second, bald assertions and conclusions of law will not enable complaint to survive
11 motion to dismiss for failure to state claim, even though relevant pleading standard is liberal.
12 *Leeds v. Meltz*, 85 F.3d 51 (2nd Cir. 1996). In his Second Amended Complaint and Opposition,
13 Mr. Macklin assumes that it is enough that he alleges that he rescinded the loan, and DBNT and
14 SPS cannot dispute as much. Mr. Macklin is wrong. The determination of whether
15 Mr. Macklin's communication constituted a valid rescission is a legal issue. He may not merely
16 conclude as much, and the Court need not assume the truth of legal conclusions cast in the form
17 of factual allegations. *Newdow v. Congress of U.S.*, 435 F. Supp. 2d 1066 (E.D. Cal. 2006),
18 affirmed 598 F.3d 638, rehearing and rehearing en banc denied, certiorari denied 131 S.Ct. 1612.

19 Third, the incorporation by reference doctrine allows a court to consider documents whose
20 contents are alleged in a complaint and whose authenticity no party questions, but which are not
21 physically attached to the plaintiff's pleading. *Stiefel v. Bechtel Corp.*, 497 F.Supp.2d 1138 (S.D.
22 Cal. 2007). This doctrine is of particular relevance in situations where the plaintiff's claim
23 depends on the contents of a document and the defendant attaches the document to its motion to
24 dismiss, even though the plaintiff does not explicitly allege the contents of that document in the
25 complaint. *Id.* This is precisely what occurred here when Mr. Macklin incorporates by reference
26 his letter purporting to "rescind" his loan. DBNT and SPS are entitled to put that letter before the
27 Court so that the Court may consider the contents of that letter in assessing the veracity of Mr.
28 Macklin's allegations.

1 Under all three principles, the Court arrives at the same result: Mr. Macklin's demand
2 letter does not constitute a rescission notice as a matter of law. "Rescission" is defined as:

3 1. A party's unilateral unmaking of a contract for a legally sufficient reason,
4 such as the other party's material breach. Rescission is generally available as a
5 remedy or defense for a nondefaulting party and *restores the parties to their*
6 *precontractual positions*.

7 2. An agreement by contracting parties to discharge *all remaining duties of*
8 *performance* and terminate the contract.

9 Black's Law Dictionary (3d ed. 2001) (emphasis added).

10 Thus, rescission requires at a minimum that both parties to a bilateral obligation be
11 relieved of their remaining duties or restored to their original position. Other than the mere
12 mention of the term "rescission," Mr. Macklin's demand letter is not capable of an interpretation
13 that he requested that the parties be returned to their original position. To the contrary, Mr.
14 Macklin unilaterally demanded that he retain the benefit of the transaction while simultaneously
15 being relieved of the burden. Mr. Macklin's demand cannot, as a matter of law, constitute a
16 notice of rescission. Because Mr. Macklin did not rescind, Mr. Macklin cannot prevail on his
17 TILA claims under Section 1635.

18 This result is not altered by Mr. Macklin's reliance on *Merritt v. Countrywide Fin. Corp.*,
19 09-17678, 2014 WL 3451299 (9th Cir. July 16, 2014). *Merritt* concerned a district court's ability
20 to consider a plaintiff's allegations of his or her ability to tender as a precondition of stating a
21 claim for relief in the context of a motion to dismiss. *Merritt* concluded that a court may not
22 consider a plaintiff's allegations of his or her ability to tender as a precondition to stating a TILA
23 claim under Section 1635. *Id.* at *5.

24 The Court need not reach this issue, however. *Merritt* recognizes that TILA sets forth a
25 statutory procedure for rescinding under Section 1635. Mr. Macklin acknowledges as much.
26 [Opposition, 6:8-14] The first step in this process is that the borrower must notify the lender of
27 its intent to rescind. 15 U.S.C. § 1635(a). If the borrow does not initiate this process through a
28 legitimate rescission notice, then the Court need not proceed to the other timing and pleading
issues involved in *Merritt*. Here, Mr. Macklin did not rescind. The results before and after
Merritt are the same: Mr. Macklin has not stated a TILA claim.

1 **b. Mr. Macklin's may not seek protection under TILA Section 1639c.**

2 In response to DBNT and SPS's argument that Mr. Macklin's loan was not covered by 15
3 United States Code section 1639c, Mr. Macklin contends that his loan post-dated the enactment
4 of TILA and therefore he is entitled to the benefit of all subsequent amendments. Mr. Macklin is
5 wrong. Section 1639c was enacted as part of the Dodd Frank Amendment. This enactment
6 occurred several years after Mr. Macklin's loan originated. Thus, unless section 1639c is
7 retroactive, Mr. Macklin cannot claim the benefit of his statute and its requirements. Courts have
8 resolved the retroactivity of Section 1639c by declaring that it is not retroactive. *Weller v. HSBC*
9 *Mortgage Servs., Inc.*, 971 F. Supp. 2d 1072, 1077 (D. Colo. 2013). Notably, in the years since
10 courts have made this determination, Congress has not revised this section to make it retroactive.
11 Mr. Macklin's section 1639c TILA claims fails.

12 **6. Mr. Macklin's UCL claim fails.**

13 In their reply, DBNT and SPS confirm that there is no predicate wrongful, unlawful or
14 unfair conduct that would form the basis of a California Business & Professions Code section
15 17200 claim. Mr. Macklin does not rebut this point except to say that he alleges "legislatively
16 violative practices" throughout his Second Amended Complaint. This type of conclusory and
17 unsubstantiated argument is insufficient to defeat defendants' motion.

18 **C. The Second Amended Complaint contains numerous other fundamental defects**
19 **regarding the relationship between Mr. Macklin and defendants DBNT and SPS.**

20 In addition to the specific defects of the Second Amended Complaint, Mr. Macklin
21 repeatedly invokes two misstatements regarding the nature of his relationship to defendants
22 DBNT and SPS. The first misstatement concerns Mr. Macklin's standing to challenge the timing
23 of the transfer of assets in to the REMIC. The second concerns Mr. Macklin's characterization of
24 DBNT as successor to Accredited Home Lenders, Inc. ("AHL").

25 **1. Mr. Macklin lacks standing to challenge the timing of the transfer of the Note**
26 **into the REMIC.**

27 At various times, although not altogether cogent, Mr. Macklin challenges the timing of the
28 transfer of mortgage assets into the REMIC at issue. The results of this argument range from the

transfers being rendered void *ab initio* to the timing by which DBNT was to have become the beneficiary under the deed of trust. Courts have routinely rejected a borrower's ability to enforce the Pooling and Servicing Agreement ("PSA") associated with REMIC due to the borrower's lack of standing. See *Keshtgar v. U.S. Bank, N.A.* 226 Cal. App. 4th 1201, 1206-07 (2014) (disagreeing with *Glaski v. Bank of America, N.A.*, 218 Cal. App. 4th 1079, 1095 (2013); *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497 (2013) (same); *Newman v. Bank of New York Mellon*, 1:12-CV-1629 AWI, 2013 WL 1499490, at n. 2 (E.D. Cal. Oct. 11, 2013) ("no courts have yet followed *Glaski* and *Glaski* is in a clear minority on the issue.")

Mr. Macklin cannot cure his standing issue through his vague, conclusory allegations that he was a third party beneficiary of the PSA. [Opposition, 14:26-15:1] To be a true third party beneficiary capable of asserting rights under the contract, the party must be an intended beneficiary. *German Alliance Ins. v. Home Water Supply*, 226 U.S. 220, 230. To meet this requirement, Mr. Macklin must establish that he is more than an incidental beneficiary. *Id.* Parties that benefit from government contracts are generally assumed to be only incidental beneficiaries, and they may not enforce such contracts absent a clear intent to the contrary. *GECCMC 2005-C1 Plummer St. Office Ltd. P'Ship v. J. P. Morgan Chase Bank, N.A.*, 671 F.3d 1027, 1033 (9th Cir. 2012). Mr. Macklin has not – and cannot – establish that he was a specific and intended third party beneficiary of the PSA. Mr. Macklin therefore lacks standing to challenge any defects in the timing of the transfer of any mortgage assets into the REMIC.

2. Assignment of Deed of Trust does not support successor liability.

Mr. Macklin alleges that, "as purported assignee of the predatory loan contract," DBNT "carries all benefits and liabilities under the false loan as if they were the originator of the loan." [SAC, ¶¶ 7-8, 20, 58, 60, 62] Mr. Macklin is wrong.

The Ninth Circuit and California limit successor liability arising from an asset purchase "unless (1) the purchasing corporation expressly or impliedly agrees to assume the liability; (2) the transaction amounts to a 'de-facto' consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction was fraudulently entered into in order to escape liability." *Atchison, Topeka and Santa Fe Railway Co. v. Brown & Bryant*,

1 *Inc.*, 159 F.3d 358, 361 (9th Cir.1997); *Ray v. Alad Corp.*, 19 Cal. 3d 22, 28 (1977).

2 Mr. Macklin argues in typically conclusory fashion, that AHL's assignment of the
3 mortgage asset to DBNT makes DBNT AHL's successor in interest for liability purposes. Mr.
4 Macklin does not allege, nor can he, any of the accepted bases for imposing successor liability
5 arising out of DBNT's purchase of a single mortgage asset. DBNT is not AHL's successor and
6 therefore did not assume any successor liability.

7 **D. DBNT and SPS request that any dismissal be made with prejudice.**

8 In dismissing for failure to state a claim, a court retains discretion to determine whether
9 dismissal should be made with leave to amend. *See Doe v. United States*, 58 F.3d 494, 497 (9th
10 Cir.1995). Although leave to amend should ordinarily be granted, leave is not appropriate if the
11 court determines that leave would be futile. *Id.* (citations omitted). Where a dismissal is based
12 on res judicata, the dismissal is properly made without leave to amend because res judicata
13 applies not only to claims that were actually brought but also to claims that could have been
14 brought. *See, e.g., Nader v. Democratic Nat. Comm.*, 590 F. Supp. 2d 164, 170 (D.D.C. 2008)
15 *aff'd*, 09-7004, 2009 WL 4250599 (D.C. Cir. Oct. 30, 2009).

16 Mr. Macklin's claims against DBNT and SPS are precluded by his prior litigation in the
17 Adversary Proceeding. Mr. Macklin cannot cure the foundational facts that give rise to the
18 application of this judicial doctrine. Accordingly, DBNT and SPS request that the Second
19 Amended Complaint be dismissed without leave to amend.

20 **III. CONCLUSION**

21 For the foregoing reasons, DBNT and SPS respectfully request that the Court dismiss the
22 Second Amended Complaint without leave to amend.

23 Dated: August 14, 2014

CARR, McCLELLAN, INGERSOLL,
THOMPSON & HORN
Professional Law Corporation

24 By: /s/ Robert A. Bleicher

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES L. MACKLIN,

Plaintiff,

v.

MATTHEW HOLLINGSWORTH, et al.,

Defendants.

Case No. 2:10-cv-1097-MCE-KJN PS

CERTIFICATE OF SERVICE

Date: August 21, 2014

Time: 10:00 a.m.

Courtroom 25

Judge: Hon. Kendall J. Newman

I am employed by the law firm of Carr, McClellan, Ingersoll, Thompson & Horn Professional Law Corporation in the County of San Mateo, California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 216 Park Road, P.O. Box 513, Burlingame, California 94011-0513.

On the date set forth below, I served the following:

**DEFENDANTS SELECT PORTFOLIO SERVICING, INC., AND DEUTSCHE BANK
 NATIONAL TRUST CO.'S REPLY IN SUPPORT OF MOTION TO DISMISS THE
 SECOND AMENDED COMPLAINT**

by placing a true copy thereof in a sealed envelope and placing this envelope for collection and mailing this date following the ordinary business practices of Carr, McClellan, Ingersoll, Thompson & Horn Professional Law Corporation for deposit of correspondence in the United States Postal Service, addressed as follows:

James Macklin
 In Pro Per
 P.O. Box 789
 Crystal Bay, NV 89402

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 14, 2014

/s/ Shara J. Bajurin

Shara J. Bajurin

EXHIBIT M

EXHIBIT M

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES L. MACKLIN,

Plaintiff,

v.

MATTHEW HOLLINGSWORTH, et al.,

Defendants.

No. 2:10-cv-1097 MCE KJN PS

FINDINGS AND RECOMMENDATIONS

On April 15, 2014, plaintiff James L. Macklin (“plaintiff”) filed a motion for leave to amend his complaint for a second time and a proposed Second Amended Complaint (“SAC”). (ECF Nos. 40, 43.) On July 1, 2014, the court granted plaintiff’s motion for leave to amend and the proposed SAC became the operative complaint in this action. (ECF No. 42.) In the SAC, plaintiff alleges that defendants Select Portfolio Servicing, Inc. (“Select Portfolio”), Wells Fargo Bank, N.A. (“Wells Fargo”),¹ Deutsche Bank National Trust Co. (“Deutsche Bank”), and Quality Loan Service Corporation (“Quality Loan”) committed breach of contract and violations of several Federal and California statutes governing lending and other business practices in

¹ Plaintiff erroneously named Wells Fargo Bank, N.A. as Wells Fargo & Co. in the SAC. Wells Fargo Bank, N.A. notified the court of this error in its stipulation with plaintiff filed August 4, 2014. (ECF No. 50.) Wells Fargo Bank, N.A. indicates that it has accepted service of the SAC despite this error. (See *id.* at 2.)

1 connection with the origination, underwriting, servicing, and foreclosure of plaintiff's residential
2 home loan. (ECF No. 43.) Presently before the court is defendants Select Portfolio, Deutsche
3 Bank, and Quality Loan's² (collectively "defendants") motion to dismiss plaintiff's SAC pursuant
4 to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be
5 granted.³ (ECF No. 45.) Plaintiff filed an opposition and defendants filed a reply. (ECF Nos. 52,
6 56, 59.)

7 The court heard this matter on its August 21, 2014 law and motion calendar. Plaintiff
8 James Macklin appeared on his own behalf. Attorney Robert Bleicher appeared on behalf of
9 defendants Deutsche Bank and Select Portfolio. Attorney Megan Boyd appeared telephonically
10 on behalf of defendant Quality Loan. Attorney Robert Campbell appeared telephonically on
11 behalf of defendant Wells Fargo.

12 The undersigned has fully considered the parties' briefs, the parties' oral arguments, and
13 appropriate portions of the record. For the reasons that follow, it is recommended that
14 defendants' motion to dismiss be granted and that defendants Deutsche Bank, Select Portfolio,
15 and Quality Loan be dismissed from this action with prejudice.

16 I. Parties' Requests for Judicial Notice

17 As an initial matter, the court addresses defendants' and plaintiff's respective requests for
18 the court to take judicial notice of certain documents. (ECF Nos. 46, 47, 48, 53, 63.) Pursuant to
19 Federal Rules of Evidence 201, "the court may judicially notice a fact that is not subject to
20 reasonable dispute because it: (1) is generally known within the trial court's territorial
21 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot

22
23 ² The present motion to dismiss was initially filed by Select Portfolio and Deutsche Bank. (ECF
24 No. 45.) Quality Loan subsequently filed notice that it joins Select Portfolio and Deutsche Bank
25 in their motion to dismiss and argues that plaintiff's claims against Quality Loan should be
26 dismissed for the same reasons stated in the motion for summary judgment. (ECF No. 49.)
Quality Loan also argues in its notice of joinder additional grounds for dismissal not presented in
Select Portfolio and Deutsche Bank's motion to dismiss. (*Id.* at 2-3.)

27 ³ Defendant Wells Fargo does not join in the present motion to dismiss. On August 18, 2014,
28 Wells Fargo filed its own separate motion to dismiss that is currently noticed for a hearing on
September 25, 2014.

1 reasonably be questioned.”

2 Generally, a court may not consider material beyond the complaint in ruling on a motion
3 to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Lee v. City of Los Angeles, 250
4 F.3d 668, 688 (9th Cir. 2001). “However, ‘[a] court may take judicial notice of ‘matters of public
5 record’ without converting a motion to dismiss into a motion for summary judgment,’ as long as
6 the facts noticed are not ‘subject to reasonable dispute.’” Intri-Plex Technologies, Inc. v. Crest
7 Grp., Inc., 499 F.3d 1048, 1052 (9th Cir. 2007) (quoting Lee, 250 F.3d at 689 (citation omitted));
8 see also United States v. Ritchie, 342 F.3d 903, 908-09 (9th Cir. 2003).

9 A. Defendants’ Requests

10 Defendants request that the court take judicial notice of 31 different documents. (ECF
11 No. 46.) In particular, defendants request that the court take judicial notice of the following: (1)
12 the docket in Placer County Superior Court Case No. SCV 26905 (the “Superior
13 Court Action”); (2) the docket in the present action; (3) the docket in United States Bankruptcy
14 Court for the Eastern District of California Case No. 10-44610 (the “Bankruptcy Case”); (4) the
15 docket in United States Bankruptcy Court for the Eastern District of California, Case No. 11-
16 002024 (the “Adversary Proceeding”); (5) the docket in United States District Court for the
17 Eastern District of California, Case No. 2-12-cv-01752-GEB-JFM (the “Withdrawal Case”); (6)
18 the notice of default on plaintiff’s loan, recorded in the Placer County Recorder’s Office on
19 December 8, 2008; (7) the substitution of trustee document for plaintiff’s loan, recorded in the
20 Placer County Recorder’s Office on January 30, 2008; (8) the notice of trustee’s sale for
21 plaintiff’s property, recorded in the Placer County Recorder’s Office on November 25, 2009; (9)
22 the assignment of deed of trust document for plaintiff’s loan, recorded in the Placer County
23 Recorder’s Office on November 26, 2009 (10) the notice of trustee’s sale for plaintiff’s property,
24 recorded in the Placer County Recorder’s Office on November 25, 2009; (11) the trustee’s deed
25 upon sale for plaintiff’s property, recorded in the Placer County Recorder’s Office on December
26 21, 2009; (12) the complaint in the Superior Court Action; (13) the first amended complaint in the
27 Civil Action; (14) the complaint in the Adversary Proceeding; (15) the order for preliminary
28 injunction in the Adversary Proceeding; (16) the first amended complaint in the Adversary

1 Proceeding; (17) the judgment for Deutsche Bank National Trust in the Unlawful Detainer
2 Action; (18) the memorandum of decision granting in part and denying in part Deutsche Bank's
3 motion to dismiss the first amended complaint in the Adversary Proceeding; (19) Deutsche
4 Bank's motion to withdraw the bankruptcy reference, filed in the Withdrawal Case; (20)
5 plaintiff's opposition to the motion to withdraw the bankruptcy reference, filed in the Adversary
6 Proceeding; (21) the order denying the motion to withdraw the bankruptcy reference in the
7 Withdrawal Case; (22) the appellate opinion affirming trial court's judgment for Deutsche Bank
8 in the Unlawful Detainer Action; (23) the proposed second amended complaint in the Adversary
9 Proceeding; (24) the Order denying plaintiff's motion for leave to amend to file a second
10 amended complaint in the Adversary Proceeding; (25) the minute order denying plaintiff's
11 motion to file a second amended complaint in the Adversary Proceeding; (26) the memorandum
12 opinion and decision granting summary judgment for Deutsche Bank in the Adversary
13 Proceeding; (27) the order granting summary judgment for Deutsche Bank in the Adversary
14 Proceeding; (28) the judgment for Deutsche Bank in the Adversary Proceeding; (29) the minute
15 order denying plaintiff's motion to vacate judgment in the Adversary Proceeding; (30) the civil
16 minutes denying plaintiff's motion to vacate judgment in the Adversary Proceeding; and (31) the
17 Ninth Circuit Bankruptcy Appellate Panel order dismissing plaintiff's appeal of judgment in the
18 Adversary Proceeding. (Id.)

19 Because defendants' requests for judicial notice for the documents filed in the Bankruptcy
20 Case, the Adversary Proceeding, the Withdrawal Case, and plaintiff's appeal from the Adversary
21 Proceeding involve matters of public record in related judicial proceedings, these requests are
22 granted. See Biggs v. Terhune, 334 F.3d 910, 916 n.3 (9th Cir. 2003) ("Materials from a
23 proceeding in another tribunal are appropriate for judicial notice."), overruled on other grounds
24 by Hayward v. Marshall, 603 F.3d 546, 555 (9th Cir. 2010); Headwaters Inc. v. United States
25 Forest Serv., 399 F.3d 1047, 1051 n.3 (9th Cir. 2005) (taking judicial notice of the docket in a
26 related case). Specifically, the court grants defendants' request for judicial notice as to the
27 documents filed as defendants' Exhibits 3, 4, 5, 14, 15, 16, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28
28 29, 30, and 31 to their request for judicial notice. (ECF Nos. 46-3, 46-4, 46-5, 46-14, 46-15, 46-

16, 47-2, 47-3, 47-4, 47-5, 47-7, 47-8, 48-1, 48-2, 48-3, 48-4, 48-5, 48-6, 48-7, 48-8.) The court takes judicial notice of these documents filed in these earlier actions for the purpose of recognizing the judicial acts taken and the subject matter of the plaintiff's adversary proceeding before the Bankruptcy Court. See Bank v. Magna Bank of Missouri, 894 F. Supp. 1337, 1341 (E.D. Mo. 1995) aff'd, 92 F.3d 743 (8th Cir. 1996) (taking judicial notice of records from prior related bankruptcy proceeding to recognize the judicial acts taken and the subject matter of that prior proceeding). Such facts are not reasonably in dispute by the parties.⁴ However, the court declines to take judicial notice of any of the requested documents not listed above because the court finds that judicial notice of those documents is not necessary to decide the present motion to dismiss.

11 B. Plaintiff's Requests

12 Plaintiff also filed multiple requests for judicial notice. In his initial filing, plaintiff
13 requests that the court judicially notice the following five documents: (1) a Brief by the Consumer
14 Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal
15 filed in Rosenfield v. HSBC Bank, USA, Case No. 10-1442, in the United States Tenth Circuit
16 Court of Appeals; (2) the Ninth Circuit Court of Appeals' decision in Merritt v. Countrywide Fin.
17 Corp., 09-17678, 2014 WL 3451299 (9th Cir. July 16, 2014); (3) a portion of the record for the
18 Accredited Mortgage Loan Trust Series 2006-2 available on the United States Securities and
19 Exchange Commission's website; (4) a loan application form plaintiff purports to have used in
20 conjunction with obtaining his home loan; and (5) a Truth in Lending Disclosure form
21 purportedly signed by plaintiff during his home loan application process and plaintiff's federal tax

23 ⁴ Plaintiff filed an opposition to defendants' request for judicial notice. (ECF No. 51.) However,
24 many of plaintiff's objections to defendants' requests are centered on California law regarding
25 judicial notice, which is not applicable in federal court. Furthermore, to the extent that plaintiff
26 objects on the basis of the Federal Rules of Evidence, such arguments are without merit because
27 under Federal Rule of Evidence 201 "[m]aterials from a proceeding in another tribunal are
28 appropriate for judicial notice." Biggs v. Terhune, 334 F.3d 910, 916 n.3 (9th Cir. 2003); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) ("[A federal district] court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases."); Chandler v. United States, 378 F.2d 906, 909 (9th Cir. 1967). Accordingly, plaintiff's opposition to defendants' request for judicial notice is without merit.

1 return for the 2005 tax year. (Id.) Defendants filed an opposition to all of plaintiff's requests in
2 this filing except for his request for judicial notice of Ninth Circuit Court of Appeals' decision in
3 Merritt. (ECF No. 57.) On August 21, 2014, just prior to the hearing on defendants' motion to
4 dismiss, plaintiff also filed a supplemental request for judicial notice requesting that the court take
5 judicial notice of the United States Security and Exchange Commission's record of the "Master
6 Sales and Servicing Agreement" concerning the Accredited Mortgage Loan Trust Series 2006-2.
7 (ECF No. 63.)

8 Plaintiff asks the court to take judicial notice of documents that are quite different from
9 documents held to be proper subjects for judicial notice by the Ninth Circuit Court of Appeals. It
10 appears that plaintiff seeks judicial notice of all of the above documents so that he may utilize
11 them in support of the substantive allegations made in his SAC. "As a general rule, a court may
12 not take judicial notice of proceedings or records in another cause so as to supply, without formal
13 introduction of evidence, facts essential to support a contention in a cause then before it." M/V
14 Am. Queen v. San Diego Marine Const. Corp., 708 F.2d 1483, 1491 (9th Cir. 1983).
15 Accordingly, the court cannot judicially notice the Amicus Curiae brief filed in Rosenfield.
16 Furthermore, the court declines to take judicial notice of any of the other documents plaintiff
17 requests because none of those documents have any relevance to defendants' motion to dismiss
18 currently before the court. Accordingly, plaintiff's requests for judicial notice are denied.

19 II. Background

20 A. Procedural History

21 On April 2, 2010, plaintiff filed his original complaint in the Placer County Superior
22 Court alleging claims against Deutsche Bank, Select Portfolio, and other defendants regarding the
23 origination, underwriting, and servicing of the mortgage loan on plaintiff's home. (ECF No. 2-1.)
24 Defendants removed the action to this court on May 3, 2010, on the basis of both diversity and
25 federal question jurisdiction. (ECF No. 2.) On June 4, 2010, plaintiff requested leave to amend
26 his complaint and filed a proposed first amended complaint. (ECF Nos. 12, 13.) The court
27 subsequently granted plaintiff's motion. (ECF No. 14.) The defendants named in the first
28 amended complaint filed an answer on June 24, 2010, and subsequently filed a motion for

1 summary judgment. (ECF Nos. 15, 16.)

2 On September 16, 2010, plaintiff filed a Chapter 13 bankruptcy petition in the Bankruptcy
3 Court, which was subsequently converted into a proceeding under Chapter 7. (ECF No. 46-3 at 2,
4 5.) On October 6, 2010, the court stayed the proceedings in the present action pursuant to 11
5 U.S.C. § 362 in light of plaintiff's pending bankruptcy proceedings. (ECF No. 25.) The court
6 further ordered the parties to notify the court within ten days of the resolution of plaintiff's
7 bankruptcy proceedings. (Id.)

8 On January 13, 2011, plaintiff filed a complaint in an adversary proceeding against
9 Deutsche Bank before the Bankruptcy Court. (Pl.'s Adversary Compl. (ECF No. 46-14).) The
10 adversary complaint alleged, among other things, claims against Deutsche Bank for fraudulent
11 conveyance, libel, quiet title, and violations of the Truth in Lending Act ("TILA"). (Id.)
12 Deutsche Bank filed a motion to dismiss the adversary complaint, which was granted with leave
13 to amend by the Bankruptcy Court on May 12, 2011. (Electronic Docket for Adversary
14 Proceeding (ECF No. 46-4 at 11).)

15 On June 17, 2011, plaintiff filed an amended adversary complaint alleging the following
16 ten claims against Deutsche Bank: (1) violations of TILA; (2) violations of the Real Estate
17 Settlement Procedures Act ("RESPA"); (3) violations of the Fair Credit Reporting Act ("FCRA");
18 (4) fraud; (5) unjust enrichment; (6) civil RICO violations; (7) violation of California's Unfair
19 Competition Law ("UCL"); (8) breach of a security instrument; (9) wrongful foreclosure; and
20 (10) quiet title. (Pl.'s Am. Adversary Compl. (ECF No. 46-16).) Deutsche bank filed a motion to
21 dismiss the amended adversary complaint on August 3, 2011. (ECF No. 46-4 at 15.) On
22 February 12, 2012, the Bankruptcy Court granted Deutsche Bank's motion to dismiss in part,
23 dismissing the first eight claims alleged in the amended adversary complaint with prejudice, and
24 denying the motion as to plaintiff's final two claims for wrongful foreclosure and quiet title.
25 (ECF No. 47-2.) On February 28, 2012, Deutsche Bank filed an answer to the two surviving
26 causes of action. (ECF No. 46-4 at 22.)

27 On July 2, 2012, through a separate action, Deutsche Bank filed a motion to withdraw the
28 bankruptcy reference so that the adversary proceeding in plaintiff's bankruptcy case could be

1 consolidated with the present action. (ECF No. 46-5 at 2.) The district judge presiding over the
2 withdrawal case denied Deutsche Bank's motion primarily on grounds that having the district
3 court become familiar with the facts and law of the claims underlying the adversary proceeding
4 "would duplicate much of what [the bankruptcy court] has already accomplished." (ECF No. 47-
5 5 at 6-7.)

6 After the denial of Deutsche Bank's motion, the adversary proceeding resumed. On
7 October 4, 2012, plaintiff filed a motion for leave to amend his adversary complaint for a second
8 time, seeking to again add claims for violations of TILA and California's UCL, in addition to
9 stating his surviving wrongful foreclosure and quiet title claims. (ECF No. 47-7.) The
10 Bankruptcy Court denied this motion, stating several reasons why plaintiff's proposed TILA and
11 UCL claims were not cognizable as stated in the proposed second amended adversary complaint.
12 (ECF Nos. 48-1, 48-2.)

13 On February 23, 2013, plaintiff filed a motion for summary judgment as to his surviving
14 wrongful foreclosure and quiet title claims; Deutsche Bank filed a cross-motion for summary
15 judgment on these claims. (ECF No. 46-4 at 30-31.) On May 23, 2013, the Bankruptcy Court
16 granted Deutsche Bank's cross-motion for summary judgment and denied plaintiff's motion for
17 summary judgment. (ECF Nos. 48-3, 48-4.) Judgment for Deutsche Bank in the adversary
18 proceeding was entered on July 2, 2013. (ECF No. 48-5.) Plaintiff filed a motion to vacate the
19 judgment; however, that motion was denied. (ECF No. 46-4 at 33; ECF No. 48-6; ECF No. 48-
20 7.) Plaintiff then appealed the judgment. (ECF No. 46-4 at 35.) On December 16, 2013, the
21 Ninth Circuit Court of Appeal's Bankruptcy Panel denied plaintiff's appeal for lack of
22 jurisdiction. (ECF No. 48-8.)

23 On December 23, 2013, defendants filed a notice stating that plaintiff's bankruptcy
24 proceedings had reached a final resolution. (ECF No. 26.) As a result, the court lifted the stay on
25 the present action on February 4, 2014. (ECF No. 29.) Plaintiff subsequently filed a motion for
26 leave to amend his complaint for a second time along with a proposed second amended
27 complaint. (ECF Nos. 40, 43.) On July 1, 2014, the court granted plaintiff's motion and deemed
28 the proposed second amended complaint the operative complaint. (ECF No. 42.) Defendants

1 now seek to dismiss the second amended complaint pursuant to Federal Rule of Civil Procedure
2 12(b)(6). (ECF No. 45.)

3 B. Factual Allegations in the Second Amended Complaint

4 In January of 2006, a family law court in Placer County ordered plaintiff to obtain an
5 evaluation of his home's value for purposes of a marital settlement in plaintiff's pending divorce
6 proceedings. (SAC (ECF No. 43.) at 3.) Plaintiff went to the business branch of Wells Fargo
7 Bank in Loomis, California. (Id.) While there, plaintiff was advised that he would need to
8 contact Wells Fargo's home mortgage division located in Roseville, California if he wanted to
9 complete the valuation process for his home and apply for a loan to settle the marriage estate.
10 (Id.) Plaintiff went to the Wells Fargo branch in Roseville, where he met with Christine Medina,
11 a broker for Wells Fargo. (Id.) During the loan application process, plaintiff was required to
12 provide Wells Fargo with a number of documents regarding his finances, including his tax returns
13 and bank statements. (Id.)

14 Medina later gave plaintiff a telephone interview regarding his income, place of residence,
15 job history, and other information. (Id.) Medina notified plaintiff over the phone "that he was
16 qualified for a loan that would effectively 'cash out' newly acquired equity as a result of his
17 residence being over-valued" by Wells Fargo. (Id. at 3-4.) Medina then asked plaintiff to come
18 to Wells Fargo's Roseville branch to sign the loan papers. (Id. at 4.) Plaintiff decided he would
19 refinance his home in order to comply with the family court's order. (Id.)

20 Plaintiff went to the Wells Fargo in Roseville to fill out the loan paperwork. (Id.) When
21 plaintiff arrived, he was placed in a room with a manager of the office and a notary, who was
22 present for plaintiff's signing of the loan documents. (Id.) "Plaintiff was never provided with
23 any contracts to review prior to the meeting." (Id.) The manager advised plaintiff that the notary
24 had to leave for another signing in Folsom, California within the next hour and that plaintiff
25 needed to immediately sign the documents with the aid of yellow tabs Wells Fargo had pre-
26 attached to the loan documents. (Id.) "Plaintiff was then guided through the signing and had
27 completed the signing of all necessary documents within a period of less than 15 minutes." (Id.)
28 Plaintiff was not given an opportunity to review these documents and was sent home without

1 copies of any of the documents. (Id.)

2 Later that same week, Wells Fargo called plaintiff and told him to come back to the bank
3 to pick up the loan documents the following week. (Id.) The next week, plaintiff returned and
4 picked up a large file full of documents Wells Fargo purported to be the loan contract documents.
5 (Id.) However, plaintiff later learned that the documents in the folder “were blank and contained
6 only miniscule information.” (Id.) Wells Fargo told plaintiff that this was a customary practice
7 and that he should not worry because the Bank’s policy dictated that the originals were to be
8 placed into the custody of a master document custodian. (Id.)

9 Plaintiff made every installment payment due under the loan contract until August of
10 2008, when plaintiff noticed that no principal on the loan was being paid down through his
11 payments. (Id.) Plaintiff contacted the servicer of his loan to inquire into why this was
12 happening. (Id.) The servicer told plaintiff “that the loan was an interest-only loan.” (Id.)
13 However, Wells Fargo’s employee, Medina, had told plaintiff “that the loan was a fully
14 amortized, standard performing ‘principal and interest’ loan.” (Id.) “Plaintiff was never told that
15 his loan was interest-only” prior to being notified by the loan servicer. (Id.)

16 “Plaintiff executed a dispute in writing to the loan servicer challenging the validity of the
17 loan.” (Id.) Plaintiff subsequently attempted to rescind the loan contract by sending a writing to
18 counsel for the loan’s beneficiary stating plaintiff’s intention to rescind. (Id. at 4-5.) Plaintiff
19 received a written reply from the beneficiary’s counsel indicating that the loan had not been
20 rescinded. (Id. at 5.)

21 Plaintiff alleges that he later learned that Wells Fargo had placed false information in
22 plaintiff’s loan application documents, including false information regarding plaintiff’s income,
23 the amount of time plaintiff had lived in his home, the amount of time plaintiff had been
24 employed, and the actual value of the property, in order to ensure that plaintiff would be qualified
25 for a loan that he otherwise would not have been able to obtain. (Id. at 7-8.) Plaintiff further
26 alleges that Deutsche Bank was the purported assignee of the loan contract plaintiff entered into
27 with Wells Fargo and had “ratified the actions” of Wells Fargo. (Id. at 8.) Plaintiff alleges that
28 Deutsche Bank received payment from Select Portfolio when it executed the Notice of Default on

1 plaintiff's loan. (Id. at 17-18.) In addition, plaintiff alleges that "Select [Portfolio] and Quality
2 [Loan] . . . were complicit in the acts [of Wells Fargo] by an agency relationship." (Id. at 20.)
3 Finally, plaintiff alleges that all defendants illegally "took plaintiff's home by way of non-judicial
4 foreclosure." Id. at 12.

5 On the basis of these factual allegations, plaintiff asserts the following six claims against
6 all defendants: (1) "illegal contract"; (2) breach of contract; (3) TILA violations; (4) violations of
7 the Equal Credit Opportunity Act ("ECOA"); (5) FCRA violations; and violations of California's
8 UCL. (Id. at 11-23.)

9 III. Legal Standard

10 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
11 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase
12 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the "notice pleading" standard
13 of the Federal Rules of Civil Procedure, a plaintiff's complaint must provide, in part, a "short and
14 plain statement" of plaintiff's claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see
15 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). "To survive a motion to dismiss,
16 a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that
17 is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v.
18 Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads
19 factual content that allows the court to draw the reasonable inference that the defendant is liable
20 for the misconduct alleged." Id.

21 In considering a motion to dismiss for failure to state a claim, the court accepts all of the
22 facts alleged in the complaint as true and construes them in the light most favorable to the
23 plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court is "not,
24 however, required to accept as true conclusory allegations that are contradicted by documents
25 referred to in the complaint, and [the court does] not necessarily assume the truth of legal
26 conclusions merely because they are cast in the form of factual allegations." Paulsen, 559 F.3d at
27 1071. The court must construe a pro se pleading liberally to determine if it states a claim and,
28 prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an opportunity

1 to cure them if it appears at all possible that the plaintiff can correct the defect. See Lopez v.
2 Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); accord Balistreri v. Pacifica Police
3 Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (stating that “pro se pleadings are liberally construed,
4 particularly where civil rights claims are involved”); see also Hebbe v. Pliler, 627 F.3d 338, 342
5 & n.7 (9th Cir. 2010) (stating that courts continue to construe pro se filings liberally even when
6 evaluating them under the standard announced in Iqbal).

7 In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court “may generally
8 consider only allegations contained in the pleadings, exhibits attached to the complaint, and
9 matters properly subject to judicial notice.” Outdoor Media Group, Inc. v. City of Beaumont, 506
10 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not
11 consider a memorandum in opposition to a defendant’s motion to dismiss to determine the
12 propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep’t of Corrections, 151 F.3d 1194,
13 1197 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding
14 whether to grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir.
15 2003).

16 IV. Defendants’ Motion to Dismiss

17 Defendants argue that plaintiff’s claims alleged against them in the second amended
18 complaint should be dismissed with prejudice under the doctrine of claim preclusion because such
19 claims were either adjudicated by the Bankruptcy Court during the adversary proceeding or could
20 have been asserted by plaintiff during the adversary proceeding.

21 Claim preclusion “bars litigation in a subsequent action of any claims that were raised or
22 could have been raised in the prior action.” Owens v. Kaiser Foundation Health Plan, Inc., 244
23 F.3d 708, 713 (9th Cir. 2001) (quoting Western Radio Servs. Co. v. Glickman, 123 F.3d 1189,
24 1192 (9th Cir. 1997)) (internal quotation marks omitted). When federal-court jurisdiction is based
25 on the presence of a federal question, federal preclusion doctrine applies. See Taylor v. Sturgell,
26 553 U.S. 880, 891 (2008); see also Heiser v. Woodruff, 327 U.S. 726, 733 (1946). However,
27 “[f]or judgments in diversity cases, federal law incorporates the rules of preclusion applied by the
28 State in which the rendering court sits.” Taylor v. Sturgell, 553 U.S. 880, 891 (2008) (citing

1 Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001)). Nevertheless, under
2 California law, a court must apply federal preclusion rules when determining the preclusive effect
3 of a prior federal court judgment.⁵ Younger v. Jensen, 26 Cal.3d 397, 411 (1980). Accordingly,
4 under federal law, “[T]he doctrine [of claim preclusion] is applicable whenever there is (1) an
5 identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties.”
6 Owens, 244 F.3d at 713.

7 A. Identity of Claims

8 The Ninth Circuit Court of Appeals has identified four factors that should be
9 considered by a court in determining whether successive lawsuits involve an identity of claims:

10 (1) whether rights or interests established in the prior judgment
11 would be destroyed or impaired by prosecution of the second
action;

12 (2) whether substantially the same evidence is presented in the two
13 actions;

14 (3) whether the two suits involve infringement of the same right;
and

15 (4) whether the two suits arise out of the same transactional nucleus
16 of facts.

17 See C.D. Anderson & Co. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987); accord Headwaters
18 Inc. v. United States Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005); Littlejohn v. United
19 States, 321 F.3d 915, 920 (9th Cir. 2003). “The central criterion in determining whether there is
20 an identity of claims between the first and second adjudications is whether the two suits arise out
21 of the same transactional nucleus of facts.” Owens, 244 F.3d at 714.

22 In most cases, “the inquiry into the ‘same transactional nucleus of facts’ is essentially the
23 same as whether the claim could have been brought in the first action.” United States v.
24 Liquidators of European Fed. Credit Bank, 630 F.3d 1139, 1151 (9th Cir. 2011). “A plaintiff
25 need not bring every possible claim. But where claims arise from the same factual circumstances,
26

27 ⁵ Defendants removed this case from state court on the basis of both federal question and
28 diversity of citizenship jurisdiction. (See ECF No. 1.) For purposes of defendants’ present
motion, federal preclusion rules apply under either basis for subject matter jurisdiction.

1 a plaintiff must bring all related claims together or forfeit the opportunity to bring any omitted
2 claim in a subsequent proceeding.” Turtle Island Restoration Network v. U.S. Dep’t of State, 673
3 F.3d 914, 918 (9th Cir. 2012). “Newly articulated claims based on the same nucleus of facts may
4 still be subject to a [claim preclusion] finding if the claims could have been brought in the earlier
5 action.” Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 322 F.3d 1064, 1078
6 (9th Cir. 2003); United States ex rel. Barajas v. Northrop Corp., 147 F.3d 905, 909 (9th Cir.
7 1998) (“It is immaterial whether the claims asserted subsequent to the judgment were actually
8 pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could
9 have been brought.”). “The fact that res judicata depends on an ‘identity of claims’ does not
10 mean that an imaginative attorney may avoid preclusion by attaching a different legal label to an
11 issue that has, or could have, been litigated.” Tahoe-Sierra Pres. Council, Inc., 322 F.3d at 1077-
12 78.

13 Here, an identity of claims exists between the SAC in the present case and plaintiff’s
14 complaint in the Bankruptcy adversary proceeding. In the present action, plaintiff essentially
15 seeks relief from the same alleged wrongs he unsuccessfully protested in the adversary
16 proceeding. In his adversary complaint, the transactional nucleus of facts surrounding plaintiff’s
17 claims related to the refinancing of his residential mortgage with Wells Fargo in 2006, the terms
18 of his residential loan, the servicing of his residential loan, plaintiff’s attempt at rescission of that
19 loan, and the nonjudicial foreclosure resulting from plaintiff’s non-payment of that loan. (See
20 ECF No. 46-16.) Similarly, here, the crux of plaintiff’s claims in the SAC revolve around the
21 exact same series of events surrounding the origination, service of, and foreclosure on the
22 refinance loan plaintiff took out with Wells Fargo in 2006.

23 Furthermore, several of plaintiff’s claims in the SAC assert the exact same legal theories
24 based on the same conduct plaintiff alleged in the adversary proceeding. For example, plaintiff
25 asserted in his first amended adversary complaint a claim under TILA based on allegations that
26 Deutsche Bank or its agents falsified plaintiff’s loan application and failed to respond to
27 plaintiff’s notice of rescission. (See ECF No. 46-16 at 25; ECF No. 47-2 at 18.) Plaintiff now
28 seeks to assert a TILA claim against defendants on the basis of the same allegations. Similarly,

1 plaintiff asserted claims in the adversary proceeding under the FCRA and California's Unfair
2 Competition Law and has again asserted those claims in the SAC based on the same conduct that
3 was alleged in plaintiff's adversary complaint. In addition, to the extent that plaintiff asserts
4 claims in the SAC that were not alleged during the adversary proceeding, these claims are simply
5 new legal theories arising from the same transactional nucleus of facts and could have been raised
6 in the prior action. See Owens, 244 F.3d at 713-14; C.D. Anderson & Co., 832 F.2d at 1100.
7 Accordingly, there exists an identity of claims between the present action and plaintiff's prior
8 adversary proceeding before the Bankruptcy Court.

9 B. Final Judgment on the Merits

10 Here, the Bankruptcy Court granted Deutsche Bank's motion to dismiss in part and
11 dismissed the majority of plaintiff's claims with prejudice. (ECF No. 47-2.) Later, the
12 Bankruptcy Court granted summary judgment for Deutsche Bank with regard to plaintiff's
13 remaining claims and entered a final judgment in Deutsche Bank's favor. (ECF No. 48-3; ECF
14 No. 48-4; ECF No. 48-5.) Accordingly, the adversary proceeding ended in a final judgment on
15 the merits. Mpoyo v. Litton Electro-Optical Sys., 430 F.3d 985, 988 (9th Cir. 2005) ("The second
16 res judicata element is satisfied by a summary judgment dismissal which is considered a decision
17 on the merits for res judicata purposes."); Hells Cyn. Preserv. Council v. U.S. Forest Serv., 403
18 F.3d 683, 686 (9th Cir. 2005) ("[F]inal judgment on the merits' is synonymous with 'dismissal
19 with prejudice.'").

20 Plaintiff argues in his opposition that the Bankruptcy Court's judgment in his adversary
21 proceeding cannot be given preclusive effect because final judgment was entered by a United
22 States Bankruptcy Judge, an "Article I" judge, not a United States District Court Judge. (ECF
23 No. 52 at 2-3.) Plaintiff asserts that the Bankruptcy Judge's entry of a final judgment in
24 plaintiff's adversary proceeding was unconstitutional under the United States Supreme Court's
25 rulings in Stern v. Marshall, 131 S. Ct. 2594 (2011), and Northern Pipeline Const. Co. v.
26 Marathon Pipe Line Co., 458 U.S. 50 (1982), therefore invalidating the judgment entered in the
27 Bankruptcy Court in Deutsche Bank's favor. (Id.) However, plaintiff's reliance on these two
28 decisions is misplaced because subsequent decisions issued by the United States Supreme Court

1 and the Ninth Circuit Court of Appeals have further clarified the holding in Stern and show that
2 the Bankruptcy Court properly entered final judgment in plaintiff's adversary proceeding against
3 Deutsche Bank.

4 Except as otherwise provided by Congress, the district court has "original and exclusive
5 jurisdiction of all cases under Title 11 . . . [and] original but not exclusive jurisdiction of all civil
6 proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §
7 1334(a) & (b); Stern, 131 S. Ct. at 2603.⁶ Under the current statutory framework, established by
8 the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act"), Congress has
9 empowered the district court to refer any such cases and proceedings to bankruptcy judges. See
10 28 U.S.C. § 157(a). In particular, Congress has empowered the Bankruptcy Courts to "hear and
11 determine all cases under title 11 and all core proceedings arising under title 11, or arising in a
12 case under title 11," and to "enter appropriate orders and judgments," subject to appellate review
13 in the district court. 28 U.S.C. § 157(b)(1); 158(c)(2) (appeals). The Ninth Circuit Court of
14 Appeals has described the Bankruptcy Court's statutory authority as follows:

15 What the bankruptcy court may do with a given referred proceeding depends on
16 whether the proceeding is denominated a "core" or a "non-core" proceeding. In all
17 "core proceedings arising under title 11, or arising in a case under title 11," a
18 bankruptcy judge has the power to "hear and determine the controversy" and enter
19 final orders, subject only to appellate review. [28 U.S.C.] § 157(b)(1). In a non-
20 core proceeding "that is otherwise related to a case under title 11," however, a
bankruptcy judge may only "submit proposed findings of fact and conclusions of
law to the district court." Id. § 157(c)(1). The entry of final judgment in non-core
proceedings is the sole province of Article III judges.

21 In re Bellingham Ins. Agency, Inc., 702 F.3d 553, 558 (9th Cir. 2012), cert. granted, 133 S. Ct.
22 2880, and aff'd sub nom. Executive Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014).

24 ⁶ Cases under Title 11 are proceedings that are initiated by the filing of a petition in bankruptcy.
25 See 11 U.S.C. § 101(42) (bankruptcy petition "commenc[es] a case under this title"). Civil
26 proceedings that "aris[e] under title 11, or aris[e] in ... cases under title 11" are "core
27 proceedings." Stern, 1431 S. Ct. at 2605 ("core proceedings are those that arise in a bankruptcy
28 case or under Title 11"); Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1193 (9th
Cir. 2005) ("[p]roceedings 'arising in' bankruptcy cases are generally referred to as 'core'
proceedings, and essentially are proceedings that would not exist outside of bankruptcy") (citing
28 U.S.C. § 157(b)(2)).

1 While the Bankruptcy Court generally cannot enter final judgment in non-core proceedings, the
2 statutory framework provides an exception allowing the entry of final judgment in non-core
3 proceedings “with the consent of all the parties.” 28 U.S.C. § 157(c)(2). However,
4 notwithstanding Congress’s grant of authority to the Bankruptcy Courts, constitutional and
5 statutory impediments must be overcome before a bankruptcy court can adjudicate a given claim.

6 In Northern Pipeline Const. Co., the United States Supreme Court reviewed whether
7 bankruptcy judges under a statutory scheme prior to the 1984 Act “could ‘constitutionally be
8 vested with jurisdiction to decide [a] state-law contract claim’ against an entity not otherwise a
9 party to the proceeding.” Executive Benefits Ins. Agency, 134 S. Ct. at 2171 (quoting Northern
10 Pipeline Const. Co., 458 U.S. 50, and discussing the issue presented in that case). The Court held
11 that Congress’s grant of power to the Bankruptcy Courts to issue a final resolution on such a
12 claim violated Article III of the Constitution because it “impermissibly removed most, if not all,
13 of ‘the essential attributes of the judicial power’ from the Art. III district court, and has vested
14 those attributes in a non-Art. III adjunct.” Northern Pipeline Const. Co., 458 U.S. at 87.
15 Following the Supreme Court’s ruling in Northern Pipeline Const. Co., Congress enacted the
16 1984 Act, which provides the current statutory scheme under which the Bankruptcy Courts
17 operate. See In re Bellingham Ins. Agency, Inc., 702 F.3d at 559 (discussing the amendments
18 made by Congress in the 1984 Act).

19 In Stern v. Marshall, the United States Supreme Court addressed an underlying conflict
20 between Congress’s amended statutory framework created by the 1984 Act and the requirements
21 of Article III. The bankrupt in Stern had filed a common-law counterclaim for tortious
22 interference against a creditor to the estate, a claim that was expressly deemed a “core”
23 proceeding under 28 U.S.C. § 157(b)(2)(C), thereby authorizing the bankruptcy court to
24 adjudicate the claim to final judgment. 131 S. Ct. at 2604. The respondent in that case asserted
25 that Congress had violated Article III by vesting the power to adjudicate such a claim in
26 bankruptcy court. Id. at 2601. The Supreme Court agreed, holding that “Congress had
27 improperly vested the Bankruptcy Court with the “‘judicial Power of the United States’” when it
28 gave the Bankruptcy Court the statutory authority to enter final judgment on such a claim.

1 Executive Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2172 (2014) (discussing the Court’s
2 holding in Stern). Ultimately, “Stern made clear that some claims labeled by Congress as ‘core’
3 may not be adjudicated by a bankruptcy court in the manner designated by § 157(b).” Id.
4 However, as subsequently noted by the Supreme Court, “Stern did not . . . address how the
5 bankruptcy court should proceed under those circumstances.” Id.

6 In the time since Stern was decided, the Ninth Circuit Court of Appeals has addressed the
7 very issue of how a bankruptcy court should proceed when faced with such circumstances. In In
8 re Bellingham Ins. Agency, Inc., 702 F.3d 553, 568 (9th Cir. 2012), the bankruptcy trustee
9 initiated an adversary proceeding against Executive Benefits Insurance Agency (“EBIA”) and
10 other defendants, alleging, among other things, a fraudulent conveyance claim, a “core” claim
11 under § 157(b). 702 F.3d at 557. The bankruptcy court ultimately granted summary judgment in
12 favor of the bankruptcy trustee and entered a final judgment. Id. EBIA appealed the decision to
13 the district court, which reviewed the summary judgment decision *de novo* and affirmed. Id.
14 EBIA then appealed to the Ninth Circuit Court of Appeals, arguing that the bankruptcy judge was
15 constitutionally proscribed from entering final judgment on the trustee’s claims under the United
16 States Supreme Court’s ruling in Stern. Id.

17 Denying EBIA’s appeal, the Ninth Circuit Court of Appeals determined that while Stern
18 has made it clear that bankruptcy courts do not have the general authority to enter final judgments
19 on fraudulent conveyance claims asserted against noncreditors to the bankruptcy estate, there are
20 two independent sets of circumstances under which a final judgment by a bankruptcy court on
21 “core” claims subject to the Stern ruling may still be upheld. First, the court held that, pursuant to
22 28 U.S.C. § 157(c)(2), bankruptcy courts may enter final judgments on such claims “with the
23 consent of all the parties to the proceeding,” or the implied consent of the parties through their
24 failure to timely object to the bankruptcy court’s authority to enter final judgment. In re
25 Bellingham Ins. Agency, Inc., 702 F.3d at 566-70.⁷ In coming to this first holding, the court
26 reasoned that “[i]f consent permits a non-Article III judge to decide finally a non-core proceeding

27
28 ⁷ The court also noted that 28 U.S.C. § 157(c)(2) also permits a bankruptcy court to enter a final
judgment on a non-core claim upon consent of all parties. Id.

1 [pursuant to 28 U.S.C. § 157(c)(2), then it surely permits the same judge to decide a core
2 proceeding in which he would, absent consent, be disentitled to enter final judgment.” Id. at 567.
3 Second, the court held that, even in the absence of consent to the bankruptcy judge’s jurisdiction,
4 the district court may still review the bankruptcy court’s entry of judgment *de novo*, treating it as
5 proposed findings of fact and conclusions of law, thus curing the constitutional defect identified
6 in Stern. Id. at 565-66.

7 After the Ninth Circuit Court of Appeal’s decision, EBIA sought review in the United
8 States Supreme Court. The Supreme Court granted certiorari for the case to be heard during the
9 Court’s most recent term and issued a unanimous decision upholding the Ninth Circuit’s ruling.
10 Executive Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014). In affirming the decision, the
11 Supreme Court elected to resolve the case solely on the basis that the district court had conducted
12 *de novo* review of the bankruptcy court’s judgment. Id. at 2174. In particular, the Court stated:

13 We hold today that when, under Stern’s reasoning, the Constitution does not
14 permit a bankruptcy court to enter final judgment on a bankruptcy-related claim,
15 the relevant statute nevertheless permits a bankruptcy court to issue proposed
16 findings of fact and conclusions of law to be reviewed *de novo* by the district
17 court. Because the District Court in this case conducted the *de novo* review that
petitioner demands, we affirm the judgment of the Court of Appeals upholding the
District Court’s decision.

18 Id. at 2168. The Supreme Court reserved the issue of “whether Article III permits a bankruptcy
19 court, with the consent of the parties, to enter final judgment on a Stern claim . . . for another
20 day.” Id. at 2170, n.4. Because the Supreme Court declined to address this aspect of the Court of
21 Appeals’ ruling, the Court of Appeals’ holding that bankruptcy courts may enter final judgments
22 on Stern claims with the consent of all the parties to the proceeding was left undisturbed.⁸

23 ///

24 _____
25 ⁸ The court notes that the United States Supreme Court has recently granted certiorari in another
26 case for its upcoming term to address the very issue of whether Article III permits a bankruptcy
27 court to enter a final judgment on the basis of party consent. See Wellness Int’l Network Ltd. v.
28 Sharif, 272 F.3d 751 (7th Cir. 2013), cert. granted __ U.S.L.W. __ (U.S. July 1, 2014) (No. 13-
9355). Nevertheless, at this time, the court is bound to follow current precedent, i.e. the Ninth
Circuit Court of Appeals’ ruling in In re Bellingham Ins. Agency, Inc., in addressing this issue.

1 The Ninth Circuit Court of Appeals' decision in In re Bellingham Ins. Agency, Inc. makes
2 it clear that, contrary to plaintiff's argument, the reasoning in Stern did not invalidate the
3 Bankruptcy Court's issuance of a final judgment in plaintiff's adversary proceeding. As an initial
4 matter, the court notes that the Bankruptcy Court entered judgment in favor of Deutsche Bank
5 without specifying in its orders whether it was acting pursuant to § 157(b) (core) or § 157(c)(2)
6 (non-core with consent). Nevertheless, whether plaintiff's claims adjudicated in the adversary
7 proceeding were "core" claims, "core" claims subject to the limitations imposed by the reasoning
8 in Stern, or "non-core" claims is of no consequence here because plaintiff consented to the
9 bankruptcy court's jurisdiction to issue a final judgment. In the judicially noticed first amended
10 adversary complaint, the operative complaint at the time the Bankruptcy Court entered judgment
11 against plaintiff, plaintiff stated the following:

12 This adversary proceeding is a core proceeding as defined at 28 U.S.C. §
13 157(b)(2)(b) and (b)(2)(K) in that it is an action to determine the nature, extent and
14 validity of a lien on property evidence by a deed of trust, and the allowance or
15 disallowance of a claim. To the extent that this proceeding is determined to be a
non-core proceeding, Plaintiff consents to the entry of final orders or judgment by
the bankruptcy court.

16 (ECF No. 46-16 at 3.) Under the Ninth Circuit Court of Appeals' current precedent, such express
17 consent was sufficient to confer jurisdiction upon the Bankruptcy Court to issue a final judgment
18 as to plaintiff's claims asserted during the adversary proceeding, be they core claims, Stern
19 claims, or non-core claims.⁹ Furthermore, insofar as plaintiff's claims were core claims not
20 subject to the reasoning in Stern, the Bankruptcy Court had jurisdiction to enter final judgment
21 even without the consent of the parties. 28 U.S.C. § 157(b)(1); see Executive Benefits Ins.

22 ⁹ Furthermore, plaintiff impliedly consented to the Bankruptcy Court's entry of final judgment
23 because plaintiff remained silent about his objection under Stern regarding the entry of final
24 judgment by the Bankruptcy Court until after his bankruptcy proceedings had concluded. Under
25 the current Ninth Circuit precedent, implied consent through such silence is sufficient to grant a
26 bankruptcy court the authority to issue final rulings in "non-core" claims and "Stern" claims. See
27 In re Bellingham Ins. Agency, Inc., 702 F.3d at 568 ("Because EBIA waited so long to object,
28 and in light of its litigation tactics, we have little difficulty concluding that EBIA impliedly
consented to the bankruptcy court's jurisdiction."); Mann v. Alexander Dawson Inc. (In re Mann),
907 F.2d 923, 926 (9th Cir. 1990) (holding that a debtor's decision to file an adversary
proceeding in bankruptcy court, and his failure to object to the court's jurisdiction prior to the
time it rendered judgment against him, meant that "he consented to the court's jurisdiction.").

1 Agency, 134 S. Ct. at 2171. Accordingly, because the Bankruptcy Court had the authority to
2 issue a final ruling in plaintiff's adversary proceeding, its grant of summary judgment in Deutsche
3 Bank's favor in that case constitutes a final judgment for purposes of claim preclusion.

4 C. Identity or Privity Between Parties

5 The third requirement for the doctrine of claim preclusion is privity of parties. "Privity . . .
6 is a legal conclusion designating a person so identified in interest with a party to former litigation
7 that he represents precisely the same right in respect to the subject matter involved." Headwaters
8 Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052-53 (9th Cir. 2005) (internal quotations and
9 citations omitted). Privity is obviously present when a party to the present action was also a party
10 in the previous case. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322
11 F.3d 1064, 1081 (9th Cir. 2003). However, privity is not limited to those who were parties to
12 both actions. "Even when the parties are not identical, privity may exist if 'there is 'substantial
13 identity' between parties, that is, when there is sufficient commonality of interest.'" Id. (quoting
14 In re Gottheiner, 703 F.2d 1136, 1140 (9th Cir. 1983)). "[P]rivacy is a flexible concept dependent
15 on the particular relationship between the parties in each individual set of cases." Tahoe-Sierra
16 Pres. Council, Inc., 322 F.3d at 1081. Generally, "federal courts will bind a non-party whose
17 interests were represented adequately by a party in the original suit." In re Schimmels, 127 F.3d
18 875, 881 (9th Cir. 1997). "In addition, 'privity' has been found where there is a 'substantial
19 identity' between the party and nonparty, . . . and where the interests of the nonparty and party
20 are 'so closely aligned as to be 'virtually representative.''" Id. (internal citations omitted).

21 1. Deutsche Bank

22 There is no doubt that there is an identity of parties with respect to Deutsche Bank.
23 Deutsche Bank was named as the sole defendant in the previous adversary proceeding. Plaintiff
24 now names Deutsche Bank as a defendant to the present action and asserts claims against it that
25 were adjudicated, or could have been adjudicated, by the Bankruptcy Court in the adversary
26 proceeding. Accordingly, all of plaintiff's claims in the present action against Deutsche Bank are
27 precluded by the prior bankruptcy action.

28 ///

1 2. Select Portfolio and Quality Loan

2 Select Portfolio argues that even though it was not a party to the adversary proceeding, the
3 allegations in plaintiff's SAC show that there is privity between it and Deutsche Bank because
4 they "confirm that the requisite close relationship and substantial identity exists between
5 [Deutsche Bank] and [Select Portfolio] for res judicata purposes." (ECF No. 45-1 at 23.) Quality
6 Loan states in its notice of joinder that it joins Select Portfolio in this argument. (ECF No. 49 at
7 2.) The court agrees that privity is present between Deutsche Bank and these two defendants.

8 In the SAC, plaintiff alleges that Deutsche Bank was the trustee and assignee of the
9 beneficial interest in his home loan, that Select Portfolio was the servicer of his loan, that an
10 agency relationship existed between these two parties, and that they worked in concert to illegally
11 foreclose on his loan. (ECF No. 43 at 2, 6, 8, 12-13, 16, 20.) The allegations in the SAC
12 regarding Select Portfolio's role in the foreclosure on plaintiff's loan are derivative of the
13 arguments that Deutsche Bank did not have authority—in light of the alleged fact that the
14 Deutsche Bank could not assume ownership over plaintiff's loan because the loan had been
15 originated under false pretenses—to direct Select Portfolio to proceed with the foreclosure.
16 Furthermore, Select Portfolio is alleged to be an agent of Deutsche Bank and was allegedly acting
17 on Deutsche Bank's behalf when it engaged in its loan servicing and foreclosure activities. The
18 alleged existence of an agency relationship is sufficient to show privity between these two
19 defendants for purposes of claim preclusion. Adams v. Cal. Dep't of Health Servs., 487 F.3d 684,
20 691-92 (9th Cir. 2007) (agents and employees in sufficient privity to invoke claim preclusion);
21 see also Solomon v. E-Loan, Inc., 2011 WL 1253840, at *5 (E.D. Cal. Mar. 30, 2011).

22 Accordingly, the court concludes Select Portfolio was so "identified in interest" with Deutsche
23 Bank in the prior lawsuit, that privity exists between them for purposes of claim preclusion.

24 Similarly, the allegations in the SAC show that Quality Loan was also in privity with
25 Deutsche Bank. The only allegations in the SAC regarding Quality Loan are that it "acted in
26 concert with Defendant [Deutsche Bank] as an agent to falsely make a declaration of a default
27 where none existed" and that the "Notice of Default was executed by Defendant Quality [Loan] at
28 the request of Defendant Select [Portfolio]." (ECF No. 43 at 12, 17.) The alleged fact that

1 Quality Loan acted as an agent on behalf of Deutsche Bank when engaging in the activities
2 alleged in the SAC shows that the two are in privity. See Adams, 487 F.3d at 691-92.
3 Accordingly, there is also privity between Deutsche Bank and Select Portfolio that satisfies the
4 final element of the claim preclusion doctrine.

5 Based on the foregoing, the court concludes that the doctrine of claim preclusion applies
6 to plaintiff's present lawsuit against defendants Deutsche Bank, Select Portfolio, and Quality
7 Loan. Accordingly, this action should be dismissed with prejudice as to these defendants.

8 V. Conclusion

9 Based on the foregoing, IT IS HEREBY RECOMMENDED that:

10 1. Defendants Select Portfolio Servicing, Inc., Deutsche Bank National Trust Co., and
11 Quality Loan Service Corporation's motion to dismiss the second amended complaint (ECF Nos.
12 45, 49) be GRANTED; and

13 2. Defendants Select Portfolio Servicing, Inc., Deutsche Bank National Trust Co., and
14 Quality Loan Service Corporation be dismissed from this action with prejudice.

15 These findings and recommendations are submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
17 days after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
20 shall be served on all parties and filed with the court within fourteen (14) days after service of the
21 objections. The parties are advised that failure to file objections within the specified time may
22 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th
23 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

24 IT IS SO RECOMMENDED.

25 Dated: September 8, 2014

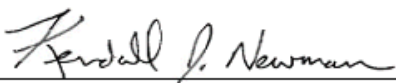
26 
27 KENDALL J. NEWMAN
28 UNITED STATES MAGISTRATE JUDGE

EXHIBIT N

EXHIBIT N

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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JAMES L. MACKLIN,

Plaintiff,

vs.

SELECT PORTFOLIO SERVICING, INC.,
DEUTSCHE BANK NAT'L TRUST CO. AS
TRUSTEE FOR THE
CERTIFICATEHOLDERS OF
ACCREDITED MORTGAGE LOAN TRUST
SERIES 2006-2, WELLS FARGO & CO.,
QUALITY LOAN SERVICES, INC.,

Defendant(s).

Case No: 2:10-cv-01097-MCE-KJN

**PLAINTIFF'S OBJECTION TO
MAGISTRATE KENDALL J. NEWMAN'S
FINDINGS AND RECOMMENDATIONS;
REQUEST FOR HEARING UNDER
FEDERAL RULES OF EVIDENCE RULE
201 (e)**

TO THE COURT, PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that Plaintiff James L. Macklin hereby Objects to U.S. District Court Magistrate Kendall J. Newman's Findings and Recommendations entered into the Court record on 9/8/2014 in the above titled Action.

FRE Rule 201 (e): On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the Court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard. Plaintiff Macklin requests a Hearing to determine the nature of facts submitted by Defendants and on the propriety of such judicial notice. Because FRE Rule 201 (e) does not require this request to be by Motion, Plaintiff

1 asks this Court to provide a Hearing calendar in a reasonable time period not to exceed sixty (60)
2 days from the Hearing on this Objection.

3 Plaintiff James L. Macklin received, by U.S. mail, the Proposed Findings and
4 Recommendations on September 11th, 2014.

5 Fed. R. Civ. P., Rule 72 (b)(2): Dispositive Motions/Objections. Within 14 days after being
6 served with a copy of the recommended disposition, a party may serve and file specific
7 objections to the proposed findings and recommendations. A party may respond to another
8 party's objections within 14 days after being served with a copy. Unless the district judge orders
9 otherwise, the objecting party must promptly arrange for transcribing the record, or whatever
10 portions of it the parties agree to or the Magistrate judge considers sufficient.

11 Fed. R. Civ. P. Rule 72 (b)(3): Resolving Objections: The district judge must determine *de*
12 *novo* any part of the Magistrate judge's disposition that has been properly objected to. The
13 district judge may accept, reject, or modify the recommended disposition; receive further
14 evidence; or return the matter to the Magistrate judge with instructions.

15 Because Plaintiff received the Findings and Recommendations on September 11th, 2014,
16 timely filing of this Objection comes on or before September 25th, 2014.

17 In the Magistrate's findings, the Court substantially relied upon representations made by
18 counsel for Defendants within Declarations made by Robert Bleicher. The Court also relied
19 heavily on previously heard matters and exhibits used within the Bankruptcy Court Adversary
20 Proceeding. Plaintiff objects generally and specifically to the findings as follows.

21 JUDICIAL NOTICE

22 At pages 4-5 of the Magistrate's Findings and Recommendations, the Court substantially
23 allowed Defendants to judicially notice virtually every document requested by Defendants
24 stating: "The court takes judicial notice of these documents filed in these earlier actions for the
25 purpose of recognizing the judicial acts taken and the subject matter of the Plaintiff's adversary
26 proceeding before the Bankruptcy Court." (Ln. 1-3, Pg. 5). Among Defendant's requests are
27
28

1 many documents of which Plaintiff also requested the same judicial notice. The Court previously
2 took judicial action based on documents submitted for the record. The truthfulness and accuracy
3 of those documents is the subject of Plaintiff's case at Bar here. Plaintiff objects to the judicial
4 acts taken in the previous matter and this Court's reliance on those acts based upon documents
5 where facts contained within those documents are in dispute, objections to which those
6 documents are timely made.

7 Then, at pg. 5, Ln. 12-21, Pg. 6 Ln. 1-7, the Court identifies documents that were requested to
8 be judicially noticed by Plaintiff: Items (3), (4), (5) and the final item named by the Court (ECF
9 No. 63), the "Master Sales and Servicing Agreement" concerning the Accredited Mortgage Loan
10 Trust Series 2006-2, were all exhibits and records within the same Bankruptcy Court adversary
11 proceeding, yet, the Court denied Plaintiff's request for judicial notice.

12 The Court uses the language that Plaintiff "purports" that documents (3), (4) and (5) were used
13 by Defendants. This use of the word "purports" is a prejudicial disposition and shows that the
14 Court did not properly interpret the manner and method in which Plaintiff requested judicial
15 notice. These instruments are permanent records of the Bankruptcy Court and are subject to
16 timely repudiation as to the information contained within the documents. Whether or not that
17 information is true or false is subject to FRE Rule 201 (e), an opportunity to be heard on the
18 merits and truthfulness of the records. Plaintiff was not afforded his right to be heard under FRE
19 Rule 201 (e). Plaintiff is entitled to such a Hearing. Plaintiff objects to having been refused his
20 right to a hearing under the Rule, *id.*

21 As to document (3), the Court has already taken notice of the facts contained within the United
22 States Securities & Exchange Commission Master Sales & Servicing Agreement ("MSSA") for
23 "AMLT 2006-2" trust in the Bankruptcy adversary proceeding. They are self-authenticating
24 records and as such, are beyond objection and hearsay. The MSSA is a permanent record in the
25 Bankruptcy Court and at the United States Securities & Exchange Commission, a governmental
26 agency, yet judicial notice was denied by the Magistrate. Plaintiff objects to the Court's denial of
27 a properly submitted request for judicial notice. Under FRE Rule 102, Plaintiff has the right to
28

1 promote and develop evidence re: relevant law to the end of ascertaining the truth in the instant
2 case, glean from applying the relevant facts to the relevant law, thus securing a just
3 determination.

4 Document (4) is the loan application, exhibited as a record within the Bankruptcy adversary
5 proceeding, and has never been refuted or challenged by Defendants. It is a record of the
6 previous Court. Plaintiff was denied judicial notice by the Magistrate in the instant case,
7 incorrectly. Plaintiff is entitled to judicial notice and under FRE Rule 201 (e), a Hearing to
8 determine the attendant truthfulness and facts contained therein. Plaintiff objects to the
9 Magistrate's denial of judicial notice of document (4). FRE Rule 103 (e) allows the Court to take
10 notice of a plain error affecting a substantial right, even if the right was not properly preserved.
11 Facts contained within the document clearly evidence an irrefutable right of Plaintiff to prosecute
12 his timely claims.

13 Document (5) is also a permanent record from the previous Bankruptcy Court as exhibited by
14 Plaintiff, thus, it is not subject to denial of judicial notice by this Court. Plaintiff objects to the
15 Court's denial of judicial notice because there are material facts in dispute contained within the
16 documents.

17 Plaintiff objects to the disposition of the Magistrate as relates to this case as the Findings and
18 recommendations do not afford equal protection or treatment of Plaintiff by the Court. Under the
19 Court's exact language used to support Defendant's request for judicial notice, Plaintiff's request
20 should have also been granted. *Bank v. Magna Bank of Missouri*, 894, F. Supp. 1337, 1341 (E.D.
21 Mo. 1995), *aff'd*, 92 F. 3d 743 (8th Cir. 1996) (taking judicial notice from prior related
22 bankruptcy proceedings to recognize the judicial acts taken and the subject matter of that prior
23 proceeding). If Plaintiff were afforded a Rule 201 (e) Hearing and were able to show that there
24 were false facts contained within those documents, or that, in fact, the underlying debt obligation
25 was never lawfully held by the Defendant(s), both subject matter jurisdiction and judicial acts
26 taken by the previous Court would have been reviewed *de novo* by the higher Court and a much
27 different Finding would result. The previous rulings by the Bankruptcy Court would also come
28

1 under scrutiny as to its Rulings and judicial acts. Plaintiff was not afforded this right under Rule
2 201 (e).

3 Further, the very facts contained within the documents requested by Plaintiff for judicial notice
4 are the facts at issue in the underlying action. The Court cannot take judicial notice of disputed
5 facts contained within Court records. Federal Rules of Evidence Rule 201 does not allow the
6 Court to take judicial notice of facts that are in dispute. The very documents that Plaintiff
7 requested judicial notice by the Court were, in fact, repudiated as to the truthfulness and
8 accuracy of facts contained within those documents used by Defendants in the adversary
9 proceeding in Bankruptcy Court.

10 FRE Rule 201 (b) states clearly that judicial notice may be taken of a fact *that is not subject to*
11 *reasonable dispute* [emph. mine] because it: (1) is generally known within the trial Court's
12 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose
13 accuracy cannot be reasonably questioned.

14 Plaintiff clearly and unambiguously stated in his Second Amended Complaint and Opposition
15 to Dismiss that all records within the Bankruptcy Court's records were disputed and that the facts
16 contained within those documents were repudiated. See: Plaintiff's Opp. To MTD, Pg. 3, Ln. 21,
17 pg. 4, Ln. 5, pg. 13, Ln. 27, pg. 14, Ln. 1, pg. 18, Ln. 12, pg. 19, Ln. 6 & 24, pg. 20, Ln. 4 & 7;
18 Second Amended Complaint, at pg. 29, Ln. 4.

19 The Court here has expressed in its Findings that "Such facts are not reasonably in dispute by
20 the parties" and uses a footnote (4) at pg. 5, Ln. 7. This is not true. The facts contained within the
21 documents are in dispute. Plaintiff acknowledges that the documents and records of the Court
22 are, in fact, records of the Court; however, Plaintiff has clearly and unambiguously refuted the
23 truthfulness and accuracy of the documents specifically plead by Plaintiff. Plaintiff is harmed
24 and prejudiced by the Court's disposition as to what "facts" are being noticed because Plaintiff
25 has refuted the truthfulness of those records. If the Court were to rely upon disputed exhibits and
26 evidence, Plaintiff will be denied his right to due process through discovery and reasonable
27 inquiry as to those records.
28

1 Plaintiff timely and effectively objected to the request for judicial notice (Plaintiff's Objection
2 to Defendant's Request for Judicial Notice) and has a right to be heard. FRE Rule 201 (e): "On
3 timely request, a party is entitled to be heard on the propriety of taking judicial notice and the
4 nature of the fact to be noticed. If the Court takes judicial notice before notifying a party, the
5 party, on request, is still entitled to be heard." Plaintiff was not "notified" of the Court's decision
6 to take judicial notice of Defendant's documents until the day of the Hearing on Defendant's
7 Motion to Dismiss, August 21st, 2014. Plaintiff is still entitled to be heard because Plaintiff
8 specifically and timely objected to the Request. Plaintiff was denied such right by the Magistrate.

9 The Court also denied judicial notice of a Court record by denying the judicial notice of an
10 Amicus Brief by the Consumer Financial Protection Bureau ("CFPB") (Document #1, pg. 5, Ln.
11 13, Findings and Recommendations) a U.S. governmental agency (Findings and
12 Recommendations, pg. 6, Ln. 18). This brief is a record of the *Rosenfield v. HSBC Bank, USA*,
13 Case No. 10-1442, US 10th Cir. Court of Appeals. Yet, in this Court's footnote at pg. 5, the Court
14 specifically cites to *Biggs v. Terhune*, 334 F.3d 910, 916 n.3 (9th cir. 2003) and *United States v.*
15 *Wilson*, 631 F.2d 118, 119 (9th cir. 2003) ("[A federal district] court *may* take judicial notice of
16 its own records in other cases, as well as the records of an inferior court in other cases");
17 *Chandler v. United States*, 378 F.2d 906, 909 (9th cir. 1967).

18 In this footnote (4), the Magistrate summarily grants Defendants judicial notice, denies
19 Plaintiff's objection to said notice, and denies Plaintiff's *identical* request. As is plain by the
20 previous paragraph, the Court may take judicial notice of parallel court cases and their
21 documents within the record, yet, the Court here did not. The fact that the CFPB entered its self-
22 governing opinion as to the merits of that case is also central to the *law* (as opposed to factual
23 allegations) of Plaintiff's case and the Court should have taken notice of the Brief by CFPB. It is
24 relevant and the Court has a duty of reasonable inquiry. The *Amicus Brief* identifies construction
25 of the TILA laws and interpretations that are directly on-point in this case where Plaintiff was
26 dismissed improperly by the previous Bankruptcy Court. The District Court Magistrate now uses
27 this incorrect interpretation against Macklin's rights in its ruling on the Hearing for the Motion to
28

1 Dismiss. This blatant misinterpretation of the law cannot stand. Plaintiff has rights under the
2 Truth-In-Lending-Act that were abrogated by the Bankruptcy Court.

3 It is also relevant to note that the CFPB expressed its opinion as to TILA claims that are
4 factually and legally *identical* to Plaintiff's here. These facts are considered as the official
5 opinion and proper interpretation of law of the CFPB and, because the CFPB is granted the
6 authority to promulgate its own Rules, the Court had a duty to, at a minimum, review the subject
7 matter and take notice of the Brief.

8 At pg. 6, Ln. 8-18, the Court *supposes* that Plaintiff requested judicial notice of documents in
9 order to utilize them as supporting allegations. (Ln. 9: "It *appears* that plaintiff seeks judicial
10 notice...so that he may utilize them in support of the substantive allegations made in his SAC").

11 The facts that Plaintiff used to support his causes of action were already judicially noticed, and
12 accepted by the Court, within the Bankruptcy Court and within records used by Defendants
13 request for judicial notice. Plaintiff never inferred or asserted anywhere that the request for
14 judicial notice was directed, exclusively or otherwise, to supporting allegations. The record is
15 bereft of any such assertion or inference. The disposition of the Magistrate here again prejudices
16 Plaintiff. Because *de novo* review is appropriate here, the Court must look to the attendant
17 documents that were accepted by the Magistrate on behalf of Defendants and compare those to
18 the exact same documents that were denied to Plaintiff. The U.S. Tax return of Plaintiff is not
19 subject to dispute as it is a permanent record of the Internal Revenue Service and was used by the
20 Defendants to create an illegal contract (Doc #5, Findings and Recommendations, pg. 5, Ln. 21).
21 It is a government document that is not subject to reasonable dispute because it can be accurately
22 and readily determined from sources whose accuracy cannot be reasonably questioned. FRE
23 Rule 201 (b)(2). Judicial notice should have been, and must be, granted to Plaintiff. Plaintiff is
24 entitled to a complete record for purposes of preserving the record for a potential Appeal.
25 Plaintiff objects to the disposition as it prejudiced his rights and left out material facts that could
26 be used to develop evidence law. FRE, Rule 102, 103.

1 Facts may be refuted, challenged and drawn from these records that not only contradict the
2 Court's findings, but that demand an inquiry by this Court.

3 THE LEGAL STANDARD

4 The Court cites to *Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009) in its
5 consideration of legal standard for Motions to Dismiss. "The court is 'not', however, required to
6 accept as true conclusory allegations that are contradicted by documents referred to in the
7 complaint..." Not one allegation within Plaintiff's Complaint is contradicted by any document
8 referred to in the complaint. Plaintiff meets and exceeds all of the requirements that would
9 preclude a Motion to Dismiss under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl.*
10 *Corp. v. Twombly*, 550 U.S. 554, 570 (2007)).

11 The Magistrate in this Court continually relies upon the case of *Executive Benefits Ins. Agency*
12 *v. Arkison*, 134 S. Ct. 2165 (2014) ("EBIA") in issuing its findings against Plaintiff here. This
13 case was taken up by the U.S. Supreme Court and in its decision the Court stated: "*We hold*
14 *today that when, under Stern's reasoning, the Constitution does not permit a bankruptcy court to*
15 *enter final judgment on a bankruptcy-related claim, the relevant statute nevertheless permits a*
16 *bankruptcy court to issue proposed findings of facts and conclusions of law to be reviewed de*
17 *novo by the district Court. Because the District Court in this case conducted the de novo*
18 *review that petitioner demands, we affirm the judgment of the court of appeals upholding the*
19 *District Court's decision.*" [Emph. mine].

20 In the instant matter, no such *de novo* review was ever conducted by the District Court. The
21 Supreme Court was very specific in its ruling and the facts are significantly different here. There
22 simply was never a *de novo* review of Macklin's bankruptcy case, ever. Plaintiff objects to the
23 Court's reliance on case law that is irrelevant and not directly on point to Plaintiff's facts.

24 Had *de novo* review been completed by the District Court in this matter, Plaintiff would have
25 had the opportunity to challenge the veracity, truthfulness and accuracy of documents that are in
26 dispute. Plaintiff's case is distinguishable from *EBIA*, thus, the authority is irrelevant.
27
28

1 As to the Court's position on "consent". Although the matter of consent will be reviewed by
2 the Supreme Court, there is controlling authority directly from the U.S. Supreme Court that, at
3 this time, controls this matter.

4 From *EBIA*: "**If** the claim satisfies the criteria of § 157(c)(1), the Court simply treats the claim
5 as non-core; The bankruptcy Court should hear the proceeding **and submit proposed findings of**
6 **fact and conclusions of law to the district Court for de novo review and entry of judgment.**"

7 None of these procedures were availed to Plaintiff in this case. [Emph. mine]

8 Further, the Supreme Court specifically stated the word "**If**" in its findings, relative to 157
9 (c)(1). We now look back to *Stern* to see **if** the claim satisfies the criteria...and we find that the
10 consent issue is not available...Article III is a constitutional structural limit on the powers of the
11 federal judiciary. No constitutional deficiency can be overcome by consent. A constitutional
12 limit on the power of the court **cannot be overcome by consent**, as determined in *Sosna v. Iowa*,
13 419, US 393, 398; *Mitchell v. Mauer*, 293 US 237, 244. Plaintiff's bankruptcy case here has
14 never received the benefits as adjudicated in *EBIA*, that being a submittal of proposed facts and
15 conclusions by the lower court to the district court, which the Supreme Court specifically relied
16 upon in its ruling...*EBIA* is not controlling and does not satisfy Defense's burden. Dismissal was
17 not appropriate by the Magistrate in the instant case. Thus, the disposition of the Magistrate is
18 objected to properly. Macklin could not consent to abrogating a structural, Constitutional limit
19 on the court's authority under U.S. Supreme Court precedent, *Sosna*, *Mitchell*, *id.*

20 **NEW INTERPRETATION OF LAW: TRUTH IN LENDING ACT**

21 In Defendant's MTD, Memorandum of Points and Authorities (pg. 9, Ln. 24-pg. 10, Ln. 9),
22 Defendant relies substantially on language drawn from a previous ruling from the Bankruptcy
23 Court. In the Bankruptcy Court's ruling, the Court specifically states: "The court finds that the
24 Plaintiff was entitled to send a notice of his intent to rescind, however, the court finds that the
25 time to litigate the validity of the rescission has passed."

26
27 This statement by the Court contradicts both the written statute and the law as promulgated by
28 the CFPB itself. There is no language anywhere within Truth In lending Act, or in its legislative

1 intent, that mandates a time for litigating a rescission under § 1635 et. seq. Plaintiff objects to the
2 Court's reliance on the Bankruptcy Court's improper interpretation of the law under TILA.

3 Defendants had a duty to file their own case challenging the rescission based on the language
4 of the statute itself. Once the rescission was made, the time granted to comply with, or challenge,
5 the rescission by the beneficiary was 20 days. "The only requirement to be satisfied, for the
6 obligor to exercise his right to rescind, is that he must notify the creditor of the rescission by
7 mail, telegram, or other means of written communication (12 C.F.R. § 226.23 (a) (2)) and within
8 20 days of receiving the notice of rescission, the creditor shall return to the obligor any money or
9 property given as security, earnest money, down payment, or otherwise, and shall take any action
10 necessary or appropriate to reflect the termination of any security interest created under the
11 transaction."

12 The Court has acknowledged that Plaintiff had the right to rescind, *id.* 15 U.S.C. § 1635 (b)
13 states: "An obligor who exercises their right to rescind is not liable for any finance charges, and
14 any security interest given by the obligor, including any such interest arising by operation of law,
15 **becomes void upon rescission.**"[emph. mine]. When Plaintiff rescinded the loan and Defendant
16 failed to challenge (by Action) the rescission *and* failed to return money given, the security
17 interest became void after the 20 days ran. In other words, the deed of trust was void on March
18 3rd, 2009, 20 days after Defendant received the notice of rescission. See: Def's Request for
19 Judicial Notice, DOC 47-8, pg. 2 of 64. Defendant was precluded, on March 3rd, 2009, from
20 any act against Plaintiff's interests, judicial or non-judicial, in furtherance of an action relying
21 upon the deed/lien. The deed was void by operation of law. Defendants had no lien, by operation
22 of law, upon which to inflict a non-judicial foreclosure or sale against Plaintiff's rights and
23 interests after March 3rd, 2009.

24 Because the Court took judicial action under TILA against Plaintiff incorrectly at the time that
25 it issued its rulings in dismissing his claims, and *de novo* review never occurred in this matter,
26 Plaintiff cannot be dismissed under Rule 12 (b)(6). Justice must be served in this case.

1 In *Merritt v. Countrywide*, 9th Cir., July 16, 2014 (Approved for publication) the 9th Circuit
2 declined to extend the widely held, and previously improper, application of *Yamamoto v. Bank of*
3 *New York*, 329 F. 3d 1167 (9th Cir. 2003). The panel held that an allegation of tender or ability
4 to tender, as a condition to rescission, is not required. The panel also held that “only at summary
5 judgment may a Court order the statutory sequence of TILA rescission altered and require tender
6 before rescission, and then, only on a case-by-case basis, once the creditor has established a
7 potentially viable defense.” Defendants here had a duty to establish a viable defense against the
8 rescission and never brought such an action against Plaintiff once he lawfully and timely
9 rescinded. The language of this case is compelling, citing that “only at summary judgment” a
10 Court may alter the sequence of TILA. This establishes that the creditor must: return all
11 consideration, give notices that the security interests are cancelled, and then file an action to
12 defend against the rescission, and must do so timely (20 days after receiving notice by borrower)
13 under TILA’s strict language. A material breach of TILA resulted when Defendants did not
14 properly respond under the law.

15 In judge Sargis’ ruling in Plaintiff’s previous bankruptcy case, upon which Defendants and this
16 Court have substantially relied (Def’s MTD, DOC 45-1, pg. 15 of 30), the Court stated: “In the
17 alternative, the Court finds that the Plaintiff’s notice of rescission was not a proper notice of
18 rescission because it did not offer to tender the loan principal. As such, the Plaintiff’s right to
19 assert TILA violations would have expired at the later of 3 years or sale of the property, which
20 occurred on December 19th, 2009.” This incorrect reading of TILA has been corrected in the
21 *Merritt* decision in the 9th circuit just two short months ago. Plaintiff timely objects to the
22 disposition of the Court, which substantially relied upon the improper interpretation and
23 application of TILA. After March 3rd, 2009, Defendants had no security upon which to foreclose
24 rights. The security interest was void after such date under *Merritt* and TILA.

25 Quoting *Merritt*: “Under TILA, an obligor has the “right to rescind . . . until midnight of the
26 third business day following the consummation of the transaction or the delivery of the
27 information and rescission required under this section... whichever is later.” 15 U.S.C. §
28 1635(a). “Regardless of whether the required information and forms have been delivered, [the]

1 obligor's right of rescission shall expire three years after the date of consummation of the
2 transaction, or upon the sale of the property." Id. § 1635(f).

3 "The TILA rescission provisions set out the following sequence of events for pursuing
4 rescission: **First**, the obligor must notify [notice by U.S. Mail is sufficient] the creditor of his
5 intention to rescind, id. § 1635(a); **then**, within 20 days after receipt of notice of rescission, the
6 creditor must return to the obligor any security interest, id. § 1635(b); and **lastly**, "[u]pon the
7 performance of the creditor's obligations under this section [i.e., upon return of the security
8 interest], the obligor shall tender the property to the creditor." Id. These procedures "shall apply
9 except when otherwise ordered by a court." *Id.* This sequence ("**first, then and lastly**") is
10 mandatory. *Merritt, id.* [Emph. mine]. Under *Merritt*, the Court does not have the power or
11 authority to alter this sequence until Summary Judgment in an action defending against the
12 rescission. No such action was ever filed by Defendants.

13 "Notably, '[t]he sequence of rescission and tender set forth in § 1635(b) is a reordering of the
14 common law rules governing rescission." *Williams v. Homestake Mortg. Co.*, 968 F.2d 1137,
15 1140 (11th Cir. 1992) (citing 17A Am. Jur. 2d Contracts § 590, at 600-01 (1991)). **Specifically,**
16 **"[a]lthough tender of consideration received is an equitable prerequisite to rescission, the**
17 **requirement was abolished by the Truth in Lending Act."** *Palmer v. Wilson*, 502 F.2d 860,
18 **861 (9th Cir. 1974)** [emph. mine] "Under § 1635(b)," consequently, all that the consumer need
19 do is notify the creditor of his intent to rescind. **The agreement is then automatically rescinded**
20 **and the creditor must, ordinarily, tender first. Thus, rescission under § 1635 places the**
21 **consumer in a much stronger bargaining position than he enjoys under the traditional**
22 **rules of rescission."** *Merritt v. Countrywide*, 9th Cir. [Emph. mine].

23 Plaintiff Macklin lawfully and timely rescinded. The Bankruptcy Court then wrongfully
24 dismissed his claim. The Laws under TILA are clear and unambiguous and Macklin followed
25 them to the letter. Any reliance on the previously dismissed claim is wholly void and must be
26 over-turned immediately. The 9th circuit's decision in *Merritt* must be recognized by this Court.

1 The TILA violations that are available to Plaintiff were not fully in view or discoverable until
2 Macklin received discovery from Defendants in the District Court proceeding in late 2010, when
3 Plaintiff received volumes of documents that outlined the nature of how the loan application was
4 falsified using falsely inflated income. Plaintiff had never seen these relevant documents before
5 that time. The bankruptcy was filed within days of receipt of the discovery in this case, which
6 was then stayed by the bankruptcy filing.

7 “Equitable tolling principles are to be read into every Federal Statute of Limitations unless
8 Congress expressly provides to the contrary in clear and unambiguous language”. See: *Rotella v.*
9 *Wood*, 528, 549, 560-61, 120 Sup. Ct. Because TILA does not evidence a contrary Congressional
10 intent, its statute of limitations must be read to be subject to equitable tolling, particularly since
11 the Act is to be construed liberally in favor of consumers. The principles of discovering claims,
12 and those claims being equitably tolled is clear. Macklin had until September, 2011 to state his
13 TILA claims, and did so timely.

14 The Bankruptcy Court’s incorrect assertion that Macklin’s rescission was “expired”, due to
15 lack of tender, and the fact that the law is clearly in favor of Macklin’s timely rescission and
16 subsequent filing for relief well within the time required under equitable tolling principles mean
17 that, at a bare minimum, the TILA matter must move forward and cannot be dismissed by Rule
18 12 (b)(6). The disposition of the Magistrate in the instant matter was incorrect under the
19 substantive law.

20 CONCLUSION

21 Plaintiff is entitled to pursue claims against all Defendants as this Court has unfortunately
22 misconstrued facts and law. The Federal Rules of Evidence also support his right to be heard in
23 applying the kinds of facts to be heard and his opportunity to be heard regarding facts contained
24 within judicially noticed documents by Defendants. FRE Rule 201 et. seq.

25
26
27 Dated: September 22, 2014

/s/ Charles T. Marshall

Charles T. Marshall

Attorney for Plaintiff

EXHIBIT O

EXHIBIT O

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES L. MACKLIN,

Plaintiff,

v.

MATTHEW HOLLINGSWORTH, et al.,

Defendants.

No. 2:10-cv-1097-MCE-KJN

ORDER

On September 8, 2014, the magistrate judge filed findings and recommendations (ECF No. 65) herein which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within fourteen days. On September 22, 2014, plaintiffs filed objections to the proposed findings and recommendations (ECF No. 72). On October 9, 2014, defendant Deutsche Bank National Trust (ECF No. 77) and defendant Quality Loan Services Corporation (ECF No. 78) each filed a response to plaintiff's objections, which have been considered by the court.

This court reviews de novo those portions of the proposed findings of fact to which an objection has been made. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982); see also Dawson v. Marshall, 561 F.3d 930, 932 (9th Cir. 2009). As to any portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and

1 decides the motions on the applicable law. See Orand v. United States, 602 F.2d 207, 208 (9th
2 Cir. 1979). The magistrate judge's conclusions of law are reviewed de novo. See Britt v. Simi
3 Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

4 The court has reviewed the applicable legal standards and, good cause appearing,
5 concludes that it is appropriate to adopt the proposed findings and recommendations in full.
6 Accordingly, IT IS ORDERED that:

7 1. The Proposed Findings and Recommendations filed September 8, 2014, are
8 ADOPTED;

9 2. Defendants Select Portfolio Servicing, Inc., Deutsche Bank National Trust Co., and
10 Quality Loan Service Corporation's motions to dismiss the second amended complaint (ECF Nos.
11 45, 49) are GRANTED; and

12 3. Defendants Select Portfolio Servicing, Inc., Deutsche Bank National Trust Co., and
13 Quality Loan Service Corporation are DISMISSED from this action WITH PREJUDICE.

14
15 DATED: December 24, 2014


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17 
18 MORRISON C. ENGLAND, JR, CHIEF JUDGE
19 UNITED STATES DISTRICT COURT
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EXHIBIT P

EXHIBIT P

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JUDGMENT IN A CIVIL CASE

JAMES L. MACKLIN,

CASE NO: 2:10-CV-01097-MCE-KJN

v.

WELLS FARGO & CO., ET AL.,

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 1/14/15**

Marianne Matherly
Clerk of Court

ENTERED: January 14, 2015

by: /s/ A. Meuleman
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES L. MACKLIN,
Plaintiff,

v.

MATTHEW HOLLINGSWORTH, et al.,
Defendants.

No. 2:10-cv-01097-MCE-KJN

MEMORANDUM AND ORDER

In the operative Second Amended Complaint (“SAC”) in this action, Plaintiff alleges that Defendants Deutsche Bank National Trust (“Deutsche Bank”), Select Portfolio Servicing, Inc. (“Select Portfolio”), Quality Loan Service Corporation (“Quality Loan”), and Wells Fargo Bank, N.A. (“Wells Fargo”)¹ are liable for breach of contract, and also violated several Federal and California statutes governing lending and other business practices in connection with the origination, underwriting, servicing, and foreclosure of Plaintiff’s residential home loan. ECF No. 43. Three of the named defendants—Deutsche Bank, Select Portfolio, and Quality Loan—filed a Motion to Dismiss before the assigned Magistrate Judge on July 21, 2014. ECF 45. The Magistrate Judge issued his Findings and Recommendations on Deutsche Bank, Select

¹ Plaintiff erroneously named Wells Fargo Bank, N.A. as Wells Fargo & Co. in the SAC. Wells Fargo Bank, N.A. notified the Court of this error in its stipulation with Plaintiff filed August 4, 2014. ECF No. 50.

Portfolio, and Quality Loan's Motion to Dismiss on September 8, 2014, recommending that the Motion be granted under the doctrine of claim preclusion. ECF No. 65. On December 29, 2014, this Court adopted, in full, the Findings and Recommendations on Deutsche Bank, Select Portfolio, and Quality Loan's Motion to Dismiss. ECF No. 86.

Presently before the Court is Wells Fargo's Motions to Dismiss filed on August 18, 2014, which is also based on claim preclusion. ECF No. 62.² Before the assigned Magistrate Judge could issue findings and recommendations on Wells Fargo's Motion, Plaintiff, who had previously been proceeding pro se, obtained counsel and the case was referred to this Court by the Magistrate Judge under Local Rule 302(c)(21). ECF Nos. 71, 73, 74.

For the reasons discussed below, Wells Fargo's Motion to Dismiss is GRANTED.

BACKGROUND³

A. Procedural History

On April 2, 2010, Plaintiff filed his original complaint in the Placer County Superior Court alleging claims against Deutsche Bank, Select Portfolio, and other defendants regarding the origination, underwriting, and servicing of a loan to refinance the mortgage on Plaintiff's home. ECF No. 2-1. Defendants removed the action to this Court on May 3, 2010, on the basis of both diversity and federal question jurisdiction. ECF No. 2. Defendants filed a motion for summary judgment on August, 20 2010. ECF Nos. 15, 16. On September 16, 2010, Plaintiff filed for bankruptcy. ECF No. 46-3. The Court stayed the proceedings in the civil case in light of Plaintiff's pending bankruptcy proceedings. ECF No. 25.

² Because oral argument would not be of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local R. 230(g); ECF No. 85.

³ Because the parties are familiar with the background of this case, this section only recites a general overview of the facts as taken from the Magistrate Judge's Findings and Recommendations from September 8, 2014. Additional facts may be found in the Findings and Recommendations, ECF 65.

1 On January 13, 2011, Plaintiff filed a complaint in an adversary proceeding
2 against Deutsche Bank before the Bankruptcy Court. Adversary Compl., ECF No. 46-
3 14. Deutsche Bank filed a motion to dismiss the adversary complaint, which was
4 granted with leave to amend by the Bankruptcy Court on May 12, 2011. Electronic
5 Docket for Adversary Proceeding, ECF No. 46-4 at 11.

6 On June 17, 2011, Plaintiff filed an amended adversary complaint alleging the
7 following ten claims against Deutsche Bank: (1) violations of the Truth in Lending Act
8 ("TILA"); (2) violations of the Real Estate Settlement Procedures Act ("RESPA");
9 (3) violations of the Fair Credit Reporting Act ("FCRA"); (4) fraud; (5) unjust enrichment;
10 (6) civil Racketeer Influenced and Corrupt Organizations Act ("RICO") violations;
11 (7) violation of California's Unfair Competition Law ("UCL"); (8) breach of security
12 instrument; (9) wrongful foreclosure; and (10) quiet title. ECF No. 46-16. Deutsche
13 Bank filed a motion to dismiss the amended adversary complaint on August 3, 2011.
14 ECF No. 46-4 at 15. On February 12, 2012, the Bankruptcy Court granted Deutsche
15 Bank's motion to dismiss in part, dismissing the first eight claims alleged in the amended
16 adversary complaint with prejudice and denying the motion as to Plaintiff's final two
17 claims.

18 On October 4, 2012, Plaintiff filed a motion for leave to amend his adversary
19 complaint for a second time, seeking to again add claims for violations of TILA and
20 California's UCL, in addition to his surviving wrongful foreclosure and quiet title claims.
21 ECF No. 47-7. The Bankruptcy Court denied this motion, stating that the TILA and UCL
22 claims were not cognizable as stated in the proposed second amended adversary
23 complaint. ECF Nos. 48-1, 48-2.

24 On February 23, 2013, Plaintiff filed a motion for summary judgment on the
25 surviving quiet title and wrongful foreclosure claims; Deutsche Bank thereafter filed its
26 own cross-motion for summary judgment as to the same claims. ECF No. 46-4 at 30-31.
27 On May 23, 2013, the Bankruptcy Court granted Deutsche Bank's cross-motion for
28 summary judgment and denied Plaintiff's motion for summary judgment. ECF Nos. 48-3,

1 48-4. Judgment for Deutsche Bank was entered on July 2, 2013. ECF No. 48-5.
2 Plaintiff filed a motion to vacate the judgment, which was denied. ECF No. 46-4 at 33;
3 ECF No. 48-6; ECF No. 48-7. Plaintiff then appealed the judgment. ECF No. 46-4 at 35.
4 On December 16, 2013, the Ninth Circuit Court of Appeal's Bankruptcy Panel denied
5 Plaintiff's appeal for lack of jurisdiction because the appeal was untimely. ECF No. 48-8.

6 On December 23, 2013, Defendants filed a notice stating that Plaintiff's
7 bankruptcy proceedings had reached a final resolution. ECF No. 26. As a result, this
8 Court lifted its stay on the present action on February 4, 2014. ECF No. 29. Plaintiff
9 subsequently filed a motion for leave to amend his complaint for a second time along
10 with a proposed Second Amended Complaint ("SAC"). ECF Nos. 40, 43. On July 1,
11 2014, the assigned Magistrate Judge granted Plaintiff's motion and deemed the
12 proposed SAC the operative complaint in this matter. ECF No. 42. Defendant Wells
13 Fargo now seeks to dismiss the SAC pursuant to Federal Rule of Civil Procedure
14 12(b)(6). ECF No. 62.

15 **B. Factual Allegations in Second Amended Complaint**

16 In January 2006, a family law court in Placer County ordered Plaintiff to obtain an
17 evaluation of his home's value for purposes of a marital settlement in Plaintiff's pending
18 divorce proceedings. ECF No. 43 at 3. Plaintiff went to the business branch of Wells
19 Fargo Bank in Loomis, California. Id. While there, Plaintiff was advised that he would
20 need to contact Wells Fargo's home mortgage division located in Roseville, California, if
21 he wanted to complete the valuation process for his home and apply for a loan to settle
22 the marriage estate. Id. Plaintiff went to the Wells Fargo branch in Roseville, where he
23 met with Christine Medina, a broker for Wells Fargo. Id. During the loan application
24 process, Plaintiff was required to provide Wells Fargo with a number of documents
25 regarding his finances, including his tax returns and bank statements. Id.

26 Medina later interviewed Plaintiff by telephone regarding his income, place of
27 residence, job history and other information. Id. Medina subsequently notified plaintiff
28 over the phone "that he was qualified for a loan that would effectively 'cash out' newly

1 acquired equity as a result of his residence being over-valued” by Wells Fargo. Id. at
2 3-4. Medina then asked Plaintiff to come to Wells Fargo’s Roseville branch to sign the
3 loan papers. Id. at 4. Plaintiff decided he would refinance his home in order to comply
4 with the family court’s order. Id.

5 Plaintiff went to the Wells Fargo in Roseville to fill out the loan paperwork. Id.
6 When Plaintiff arrived, he was placed in a room with a manager of the office and a
7 notary, who was present for Plaintiff’s signing of the loan documents. Id. “Plaintiff was
8 never provided with any contracts to review prior to the meeting.” Id. The manager
9 advised Plaintiff that the notary had to leave for another signing in Folsom, California,
10 within the next hour and that Plaintiff needed to immediately sign the documents with the
11 aid of yellow tabs Wells Fargo had pre-attached to the loan documents. Id. “Plaintiff
12 was then guided through the signing and had completed the signing of all necessary
13 documents within a period of less than 15 minutes.” Id. Plaintiff was not given an
14 opportunity to review these documents and was sent home without copies of any of the
15 documents. Id.

16 Later that same week, Wells Fargo called Plaintiff and told him to come back to
17 the bank to pick up the loan documents the following week. Id. The next week, Plaintiff
18 returned and picked up a large file of documents that, according to Wells Fargo, were
19 the loan contract documents. Id. However, Plaintiff later learned that the documents in
20 the folder “were blank and contained only miniscule information.” Id. Wells Fargo told
21 Plaintiff that this was a customary practice and advised him not to worry because the
22 Bank’s policy dictated that the originals were to be placed into the custody of a master
23 document custodian. Id.

24 Plaintiff made every installment payment due under the loan contract until August
25 of 2008, when Plaintiff noticed that no principal on the loan was being paid down through
26 his payments. Id. Plaintiff contacted the servicer of his loan to inquire into why this was
27 happening. Id. The servicer told Plaintiff “that the loan was an interest-only loan.” Id.
28 However, Wells Fargo’s employee, Medina, had told Plaintiff “that the loan was a fully

1 amortized, standard performing 'principal and interest' loan." Id. "Plaintiff was never told
2 that his loan was interest-only" prior to being notified by the loan servicer. Id.

3 "Plaintiff executed a dispute in writing to the loan servicer challenging the validity
4 of the loan." Id. Plaintiff subsequently attempted to rescind the loan contract by sending
5 a writing to counsel for the loan's beneficiary stating Plaintiff's intention to rescind. Id. at
6 4-5. Plaintiff received a written reply from the beneficiary's counsel indicating that the
7 loan had not been rescinded. Id. at 5.

8 Plaintiff alleges that he later learned that Wells Fargo had placed false information
9 in Plaintiff's loan application documents, including false information regarding Plaintiff's
10 income, the amount of time Plaintiff had lived in his home, the amount of time Plaintiff
11 had been employed, and the actual value of the property, in order to ensure that Plaintiff
12 would qualify for a loan that he would otherwise have been unable to obtain. Id. at 7-8.
13 Plaintiff further alleges that Deutsche Bank was the purported assignee of the loan
14 contract Plaintiff entered into with Wells Fargo and had "ratified the actions" of Wells
15 Fargo. Id. at 8. Plaintiff alleges that Deutsche Bank received payment from Select
16 Portfolio when it executed the Notice of Default on Plaintiff's loan. Id. at 17-18. In
17 addition, Plaintiff alleges that "Select [Portfolio] and Quality [Loan] . . . were complicit in
18 the acts [of Wells Fargo] by an agency relationship." Id. at 20. Finally, Plaintiff alleges
19 that all defendants illegally "took [P]laintiff's home by way of non-judicial foreclosure." Id.
20 at 12.

21 On the basis of these factual allegations, Plaintiff asserts the following six claims
22 against all defendants in the SAC: (1) "illegal contract"; (2) breach of contract; (3) TILA
23 violations; (4) violations of the Equal Credit Opportunity Act ("ECOA"); (5) FCRA
24 violations; and (6) violations of California's UCL. Id. at 11-23.

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STANDARD

On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,337-38 (9th Cir. 1996). Rule 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations. However, “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Id. (internal citations and quotations omitted). A court is not required to accept as true a “legal conclusion couched as a factual allegation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (quoting Twombly, 550 U.S. at 555). “Factual allegations must be enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the pleading must contain something more than “a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.”)).

Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket assertion, of entitlement to relief.” Twombly, 550 U.S. at 556 n.3 (internal citations and quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing 5 Charles Alan Wright & Arthur R. Miller, supra, at § 1202). A pleading must contain “only enough facts to state a claim to relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their

1 complaint must be dismissed.” *Id.* However, “[a] well-pleaded complaint may proceed
2 even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a
3 recovery is very remote and unlikely.’” *Id.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S.
4 232, 236 (1974)).

6 ANALYSIS

8 A. Parties’ Requests for Judicial Notice

9 Before the Court addresses the merits of Defendant Wells Fargo’s Motion to
10 Dismiss, the Court will address the parties’ requests for judicial notice (ECF Nos. 62-1,
11 79-2). Pursuant to Federal Rules of Evidence 201, “the court may judicially notice a fact
12 that is not subject to reasonable dispute because it: (1) is generally known within the trial
13 court’s territorial jurisdiction; or (2) can be accurately and readily determined from
14 sources whose accuracy cannot reasonably be questioned.”

15 Generally, a court may not consider material beyond the complaint in ruling on a
16 motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) because if a
17 court considers matters outside the pleading, the motion to dismiss is converted to a
18 motion for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.
19 2001). There are two exceptions to this rule. “First, a court may consider material which
20 is properly submitted as part of the complaint If the documents are not physically
21 attached to the complaint, they may be considered if the documents’ authenticity is not
22 contested and the plaintiff’s complaint necessarily relies on them.” *Id.* (internal citations
23 and quotation marks omitted). Second, “a court may take judicial notice of matters of
24 public record without converting a motion to dismiss into a motion for summary
25 judgment, as long as the facts are not subject to reasonable dispute.” *Intri-Plex*
26 *Technologies, Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (internal
27 citations and quotation marks omitted).

28 ///

1. Defendant's Requests

Defendant asks the Court to take notice of eight documents: a deed of trust, a notice of default, two notices of trustee sale, an assignment of deed of trust, a trustee's deed upon sale, a voluntary petition filed in Bankruptcy Court, and a discharge of debtor entered by the Bankruptcy Court. ECF No. 62-1.

The first six documents are documents that were recorded in the Placer County Recorder's Office. As undisputed matters of public record, the Court may take judicial notice of their existence. See Lee, 250 F.3d at 688-89. The final two documents involve matters of public record in related judicial proceedings, of which the Court may also take judicial notice. See Biggs v. Terhune, 334 F.3d 910, 916 n.3 (9th Cir. 2003) ("Materials from a proceeding in another tribunal are appropriate for judicial notice."); Commodity Futures Trading Comm'n v. Co. Petri Marketing Group, Inc., 680 F.2d 573, 584 (9th Cir. 1982) (taking notice of pleadings).

Wells Fargo also incorporates the judicial notice request of Deutsche Bank and Select Portfolio Servicing, ECF Nos. 46-48. See ECF No. 62 at 3, n.6. To the extent that these 31 documents were noticed by the Magistrate Judge in his Findings and Recommendations (see ECF No. 65 at 3-5), they are noticed by this Court as the Court has adopted the Findings and Recommendations in full (see ECF No. 86).

2. Plaintiff's Requests

Plaintiff asks the Court to take notice of six documents: an amicus brief in an unrelated case; a published Ninth Circuit Court of Appeals opinion; the United States Securities & Exchange Commission website, which contains documents from the Accredited Mortgage Loan Trust Series 2006-2; Plaintiff's loan application; Plaintiff's income tax return; and Truth in Lending disclosures that Plaintiff signed. ECF No. 79-2. Defendant objects to all of Plaintiff's requests except for his request for judicial notice of the Ninth Circuit Court of Appeals' decision. ECF No. 84.

These are the same documents that Plaintiff attempted to have noticed by Magistrate Judge Newman in conjunction with Deutsche Bank, Select Portfolio, and

1 Quality Loan's Motion to Dismiss. See ECF No. 57. In his Findings and
2 Recommendations, the Magistrate Judge denied these requests because the documents
3 were irrelevant to the motion to dismiss and were offered to support the substantive
4 allegations in the SAC. See ECF No. 65 at 6.

5 This Court has already reviewed and adopted, in full, the Magistrate Judge's
6 Findings and Recommendations, including the findings on Plaintiff's request for judicial
7 notice of these documents. See ECF No. 86. Therefore, the Court will not take judicial
8 notice of these documents.

9 **B. Claim Preclusion**

10 Like its previously dismissed codefendants, Wells Fargo argues that Plaintiff's
11 claims as to Wells Fargo in the SAC should be dismissed with prejudice under the
12 doctrine of claim preclusion. Claim preclusion "bars litigation in subsequent action of any
13 claims that were raised or could have been raised in the prior action." Owens v. Kaiser
14 Foundation Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001) (internal quotation marks
15 omitted). Under federal law,⁴ the doctrine of claim preclusion "is applicable whenever
16 there is (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or
17 privity between parties." Id.

18 **1. Identity of Claims**

19 "The central criterion in determining whether there is an identity of claims between
20 the first and second adjudications is whether the two suits arise out of the same
21 transactional nucleus of facts." Id. at 714. The Court must also consider: "(1) whether
22 rights or interests established in the prior judgment would be destroyed or impaired
23 by prosecution of the second action; (2) whether substantially the same evidence is
24 presented in the two actions; and (3) whether the two suits involve infringement of the

25 ⁴ Defendants removed this case from California state court on the basis of both federal question
26 and diversity of citizenship jurisdiction. ECF No.1. Federal preclusion rules apply in cases where federal-
27 court jurisdiction is based on the presence of a federal question. See Taylor v. Sturgell, 533 U.S. 880, 891
28 (2008). In diversity cases, "federal law incorporates the rules of preclusion applied by the State in which
the rendering court sits." Id. In California, a court must apply federal preclusion rules when determining
the preclusive effect of a prior federal court judgment. Younger v. Jensen, 26 Cal.3d 397, 411 (1980).
Thus, federal preclusion rules apply under either basis for subject matter jurisdiction asserted herein.

1 same right.” See C.D. Anderson & Co. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987);
2 accord Headwaters Inc. v. United States Forest Serv., 399 F.3d 1047, 1052 (9th Cir.
3 2005); Littlejohn v. United States, 321 F.3d 915, 920 (9th Cir. 2003).

4 In most cases, “the inquiry into the ‘same transactional nucleus of facts’ is
5 essentially the same as whether the claim could have been brought in the first action.”
6 United States v. Liquidators of European Fed. Credit Bank, 630 F.3d 1139, 1151 (9th
7 Cir. 2011). “A plaintiff need not bring every possible claim. But where claims arise from
8 the same factual circumstances, a plaintiff must bring all related claims together or forfeit
9 the opportunity to bring any omitted claim in a subsequent proceeding.” Turtle Island
10 Restoration Network v. U.S. Dep’t of State, 673 F.3d 914, 918 (9th Cir. 2012). “Newly
11 articulated claims based on the same nucleus of facts may still be subject to a [claim
12 preclusion] finding if the claims could have been brought in the earlier action.” Tahoe-
13 Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 322 F.3d 1064, 1078 (9th
14 Cir. 2003); United States ex rel. Barajas v. Northrop Corp., 147 F.3d 905, 909 (9th Cir.
15 1998) (“It is immaterial whether the claims asserted subsequent to the judgment were
16 actually pursued in the action that led to the judgment; rather, the relevant inquiry is
17 whether they could have been brought.”).

18 The claims in Plaintiff’s SAC are either the same as the claims brought in the
19 adversary proceeding in the bankruptcy court or they are claims that could have been
20 raised because they arise out of the “same transactional nucleus of fact.” Both
21 complaints involve claims related to the refinancing of Plaintiff’s residential mortgage, the
22 terms of his residential loan, the servicing of his residential loan, Plaintiff’s attempt at
23 rescission of that loan, and the non-judicial foreclosure of the loan. See ECF No. 46-16.

24 While most of Plaintiff’s claims are directed at “Defendants” generally, it appears
25 to the Court that the claims against Wells Fargo stem from the alleged falsification of
26 Plaintiff’s loan application. The loan application was created by a Wells Fargo employee
27 and signed at a Wells Fargo branch, but the promissory note and deed of trust were
28 between Plaintiff and Accredited Home Lenders. ECF No. 45-2 at Exhibit 1. Since this

1 was the extent of Wells Fargo's involvement with Plaintiff's loan, any claims specific to
2 Wells Fargo must stem from the origination of the loan. In his first amended adversary
3 complaint, Plaintiff asserted a claim under the TILA based on allegations that Deutsche
4 Bank "or its agents" falsified plaintiff's loan application. See ECF No. 46-16 at 22-25.
5 The Bankruptcy Court considered this claim when it rendered its decision in the
6 adversary proceeding. See ECF No. 47-2 at 17. Therefore, the claims against Wells
7 Fargo in the SAC are the same as those brought in the adversary proceeding and there
8 is consequently an identity of claims.

9 **2. Final Judgment on the Merits**

10 The Magistrate Judge's Findings and Recommendations (ECF No. 65), already
11 adopted in full by this Court (ECF No. 86), determined that a decision from a bankruptcy
12 court can be given preclusive effect. Essentially, under current Ninth Circuit law,
13 decisions in core and non-core bankruptcy proceedings can be a final judgment with the
14 consent of the parties. 28 U.S.C. § 157(c)(2) (non-core claims); In re Bellingham Ins.
15 Agency, Inc., 702 F.3d 553 (9th Cir. 2012) (core claims).⁵ In Plaintiff's first amended
16 adversary complaint in the Bankruptcy Court, he stated, "Plaintiff consents to the entry of
17 final orders or judgment by the bankruptcy court." This shows that Plaintiff consented to
18 the decision in the adversary claim serving as a final judgment in the case. Therefore,
19 the Bankruptcy Court's dismissal and grant of summary judgment in favor of Deutsche
20 Bank is a final judgment for purposes of claim preclusion. Mpoyo v. Litton Electro-
21 Optical Sys., 430 F.3d 985, 988 (9th Cir. 2005) ("The second res judicata element is
22 satisfied by a summary judgment dismissal which is considered a decision on the merits
23 for res judicata purposes."); Hells Cyn. Preserv. Council v. U.S. Forest Serv., 403 F.3d
24 683, 686 (9th Cir. 2005) ("'[F]inal judgment on the merits' is synonymous with 'dismissal
25 with prejudice.'").

26 ///

27 ⁵ This holding was left undisturbed by the recent Supreme Court decision, Executive Benefits Ins.
28 Agency v. Arkison, 134 S. Ct. 2165, 2170, n.4 (2014) (reserving the issue of "whether Article III permits a
bankruptcy court, with the consent of the parties, to enter final judgment on a [claim] . . . for another day").

3. Privity

Privity is the main issue that must be decided on this Motion since the adversary proceeding in Bankruptcy Court was only between Deutsche Bank and Plaintiff. Wells Fargo was not added to this case until the SAC, which was filed in July 2014. “Privity . . . is a legal conclusion designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.” Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052-53 (9th Cir. 2005) (internal citations and quotation marks omitted). “Even when the parties are not identical, privity may exist if ‘there is ‘substantial identity’ between parties, that is, when there is sufficient commonality of interest.’” Tahoe-Sierra Pres. Council, 322 F.3d at 1081 (quoting In re Gottheiner, 703 F.2d 1136, 1140 (9th Cir. 1983)). “[P]rivacy is a flexible concept dependent on the particular relationship between the parties in each individual set of cases.” Tahoe-Sierra Pres. Council, 322 F.3d at 1081. Generally, “federal courts will bind a non-party whose interests were represented adequately by a party in the original suit.” In re Schimmels, 127 F.3d 875, 881 (9th Cir. 1997). “In addition, ‘privity’ has been found where there is a ‘substantial identity’ between the party and nonparty, . . . and where the interests of the nonparty and party are ‘so closely aligned as to be ‘virtually representative.’” Id. (internal citations omitted).

At the adversary proceeding, Plaintiff claimed that Deutsche Bank was liable for Wells Fargo’s alleged conduct in the SAC—violating the TILA by obtaining the loan under fraudulent circumstances. In the adversary proceeding, Deutsche Bank argued that the Plaintiff’s TILA claim was untimely under the statute of limitations, and the Bankruptcy Court agreed. See ECF No. 47-2 at 19-21. This is presumably the same argument that Wells Fargo would have made at the proceeding. Indeed, Wells Fargo makes this same argument in its Motion to Dismiss. See ECF No. 62 at 19. Therefore, the Court finds that Wells Fargo’s interests were adequately represented at the adversary proceeding by Deutsche Bank, creating privity between Deutsche Bank and Wells Fargo.

1 Since the three requirements for claim preclusion are met, the Court finds that
2 Wells Fargo's Motion to Dismiss must be granted.

3
4 **CONCLUSION**

5
6 For the reasons set forth above, Wells Fargo's Motion to Dismiss (ECF No. 62) is
7 GRANTED, with prejudice. The Clerk of Court is directed to close the file.

8 IT IS SO ORDERED.

9 Dated: January 12, 2015


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11 
12 MORRISON C. ENGLAND, JR., CHIEF JUDGE
13 UNITED STATES DISTRICT COURT
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EXHIBIT Q

EXHIBIT Q

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

James L. Macklin,

Plaintiff,

vs.

MATTHEW HOLLINGSWORTH, et. al.

Defendants.

CASE NO: 2:10-cv-01097-MCE-KJN

Date: February 19, 2015

Time: 2:00 p.m.

Court: Courtroom: 7, 14th floor

Judge: Hon. Morris C. England, Jr.

**MOTION FOR RELIEF FROM ORDER UNDER FEDERAL RULES OF CIVIL
PROCEDURE, RULE 60**

The court, having ruled in its Memorandum Decision and Order on January 14th, 2015, is requested to relieve Plaintiff by Vacating all Orders, Findings & Recommendations and Judgments that are in conflict with *Jesinoski v. Countrywide Home Loans Inc.*, 729 F.3d 1092 (8th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3366 (U.S. Apr. 28, 2014) (Docket No. 13-684, **SCOTUS Unanimous decision January 13th, 2015, Author: Justice Scalia**) attached hereto as **Exhibit 1, RFJN**; and *Merritt v. Countrywide Financial Corporation*, U.S. Court of Appeals, 9th Circuit, decided July 16, 2014, attached hereto as **Exhibit 2, RFJN**.

1 The grounds for this Action are that there was no mortgage or deed of trust encumbering
2 the real property of James Macklin at the outset of the related bankruptcy case and the Adversary
3 Proceeding. This court substantially relied upon the decisions of the bankruptcy court in making
4 its final ruling specifically related to Macklin's TILA Rescission. Under the terms of the Truth in
5 Lending Act ("TILA"), as reviewed and held by SCOTUS on January 13th, 2015, when the
6 "lender" failed to return Macklin's money, or file a declaratory Action within 21 days, defending
7 against his lawful rescission that was perfected on March 3rd, 2009, the mortgage was nullified and
8 the debt to the lender and any purported assignees became void by operation of law that existed at
9 the time of the perfection of rescission on March 3rd, 2009.

10 Thus, the Adversary Proceeding and the related bankruptcy under Chapter 13, converted
11 to a Chapter 7, were never about a secured creditor, nor was this case. All payments that Macklin
12 made to the original lender, including closing costs and monthly payments from April 14th, 2006
13 through March 3rd, 2009, are due back to Macklin under the strict holding by SCOTUS in the
14 *Jesinoski* case, *id.* Defendant Deutsche Bank Nat'l Trust Co., as Trustee for the Certificate-Holders
15 of the Accredited Mortgage Loan Trust Series 2006-2 ("DBNTC") in the instant Action never had
16 any interest in the Macklin loan as a result of any purported assignments, *ab initio*.

17 The bankruptcy court had specific knowledge of the rescission and went so far as to
18 acknowledge that Macklin had lawfully invoked his rescission right (see below from Hon. Judge
19 Ronald Sargis' Memorandum decision). This court relied substantially upon the bankruptcy courts
20 prior Orders and Rulings.

21 All recorded documents, including: Deed of Trust, Promissory Note, assignments of deed
22 and substitutions of trustee, Notice of Default, Notice of Sale and Trustee's Deed Upon Sale, that
23 were used by Defendant in this case that relied on a valid debt, or that post-dated the rescission
24 perfection date of March 3rd, 2009, are void by operation of law and were unavailable as
25 authoritative or as providing any form of legal notice to Macklin or this court.

26 All Orders, Judgments and Decisions that have been issued by this court are also void by
27 operation of law under the guidance of the SCOTUS decision, *id.*

Unbeknownst to Macklin, and this court, and all courts hearing matters regarding TILA Rescission claims, all of the previous decisions regarding TILA Rescission were about to be overturned by SCOTUS' unanimous decision on the matter. Macklin did, in fact, have rights that were abrogated by the actions of the court and for this reason; the previous Orders, Decisions and Judgments must be vacated in the interests of justice. The error of law cannot stand.

JURISDICTION

1. **FRCP 60(b)** provides for relief from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. As is fully briefed herein below, the court is asked to relieve Plaintiff under FRCP Rule 60(b)(1), (4), (5) and (6) by vacating all previous Orders of this court in this case. The District Court has had subject matter jurisdiction over this matter.

2. **FRCP Rule 60 (d) Other Powers to Grant Relief.** This rule does not limit a court's power to: (1) entertain an independent action to relieve a party from a judgment, order, or proceeding.

LEGAL STANDARD

3. The legal standard for FRCP Rule 60 (b) comes from the Ninth Circuit, determining that courts must apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997) (adopting this test for consideration of Rule 60(b) motions). Through other decisions, including *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220 (9th Cir. 2000), and *Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004) (en banc), the Ninth Circuit has further clarified how courts should apply this test.

1 4. There is no prejudice, nor anticipated prejudice, to the opposing party as they have held no
2 rights under the operative Rescission since March 3rd, 2009, unlawfully gained possession of the
3 subject real property at issue for over 3 years, have not sold the property, nor have they made any
4 effort to maintain the property and have, instead, allowed the property to sit un-maintained and
5 degenerating daily, thus committing waste. In fact, the opposing party has been unjustly enriched
6 by unlawfully taking putative title to and physical possession of, the Macklin property and through
7 the Bankruptcy Court's grant of possession to the opposing party because of error of law. The only
8 prejudice present is against Macklin as he lost possession of his only home. The balance tips
9 sharply in Macklin's favor here. The TILA matter is also still pending, and there is not a final,
10 non-appealable ruling, in this U.S. District court case No. 2:10-cv-1097-MCE-KJN.

11 5. The Supreme Court's decision in *Jesinoski, id.*, regarding TILA Rescission was filed
12 January 13, 2015 and there is no impact on these proceedings because of any delay. This motion
13 comes within 30 days of the landmark decision.

14 6. Plaintiff's well-pled facts from four years ago are echoed nearly verbatim in the U.S.
15 Supreme Court's opinion attached hereto as **Exhibit 1, RFJN**. Defendants had a duty to know and
16 understand the laws as they are written; ignorance of the law is not an excuse or a reason for delay.
17 Justice for Macklin has been delayed for six (6) years. Any delay at this point is purely by the
18 hands of the Defendants and, unfortunately, by the courts, due to the error of law that occurred in
19 2011, 2013 and 2015 by the Orders of both of the courts (BK and USDC).

20 7. The movant has always acted in good faith in exercising his rights to defend title to his
21 unique real property as is evinced by the U.S. Supreme Court's decision that mirrors and wholly
22 supports Plaintiff's TILA Rescission cause of action and well-pled facts related thereto. Plaintiff
23 has never acted with malice or intent to delay. The Plaintiff was dispossessed of the property as
24 soon as the temporary injunction in bankruptcy was lifted and Defendants took legal title, even if
25 only temporarily under these circumstances. See: *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd.*
26 *P'ship*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).

1 8. The balance of equities tips sharply in Plaintiff's favor as he was dispossessed of his only
2 home, while Defendant maintains a multi-billion dollar portfolio of real property income streams.
3 Macklin has waited long enough.

4 **UNDISPUTED FACTUAL BACKGROUND**

5 9. On April 14th, 2006, Plaintiff executed a note and first and second deed of trust with
6 Accredited Home Loans, Inc. totaling \$632,000.00. Macklin has alleged a perfected rescission
7 under TILA Rescission § 1635(a). **Adv. Pro.Doc. No. 129, Exhibits 1, 2, 14, 15 and 16.**

8 10. Plaintiff perfected rescission (See: **RFJN, NO. 4, Exh. 16**; *Jesinoski*) of the loan
9 transaction under TILA § 1635(a) on March 3rd, 2009, upon the lender's receipt of the rescission
10 notice by Macklin (February 12th, 2009) (**AP Doc. No. 129, Exhibit 16**) and the statutory 21 days
11 running without compliance by Lender (March 3rd, 2009).

12 11. Counsel for Lender replied to Macklin on March 31st, 2009 by arguing that the rescission
13 was not valid. **Adv. Pro. Doc. No. 129, Exhibit 15.** This written argument came more than 47
14 days after the lawful time to reply by an action to defend against the rescission was due under
15 TILA. An action was required to be filed by March 3rd, 2009 by Lender under TILA, the Lender
16 elected to waive their right. The Lender *and any purported assignees of the Lender* were equitably
17 estopped from any act in furtherance of Lender's rights that were extinguished on this critical date
18 by failure to comply with TILA. Defendant DBNTC stands in the shoes of the Lender, Accredited
19 Home Loans, Inc. This court, in both its ruling against Macklin for Defendants DBNTC and the
20 subsequent Wells Fargo Motion to Dismiss (**Document 87 filed 1-14-2015**) stated that
21 "...Deutsche Bank argued that the plaintiff's TILA claim was untimely under the statute of
22 limitations, and the bankruptcy court agreed." (**Pg. 13, Ln. 21-23; Pg. 3, Ln. 18-23**).

23 12. The court here then goes on to state that there is an identity of claims between DBNTC and
24 Wells Fargo (**DOC 87 Filed 1-14-2015, Pg. 12, Ln. 3-8**) as it specifically relates to TILA
25 Rescission. The court here next states that preclusive effect is given to decisions of the bankruptcy
26 court (**DOC 87, Pg. 12, Ln. 10-12**). Therefore, all Defendants to the Macklin Action are included
27 in all decisions by this court.
28

1 13. Original Lender, Accredited Home Lenders, Inc., executed a false/forged assignment of
2 deed attempting to transfer interest in the Macklin loan to a statutory REMIC trust (subject to
3 Internal Revenue Code § 806D et. seq.) on Nov. 30th, 2009. The trust (Defendant DBNTC) was
4 closed to transfers of beneficial interest on June 1st, 2006. **AP Doc. No. 129, Exhibit 6.** The
5 rescission was also already perfected on March 3rd, 2009. See: *Jesinoski*, RFJN Exhibit 1. The
6 original Lender had no interest to assign to DBNTC after March 3rd, 2009 by operation of law.

7 14. Plaintiff Macklin alleged Truth In Lending Act (“TILA”) Rescission in the Adversary
8 Proceeding (Case No. 11-02024) in this court. See: **AP Dckt. No’s. 120-129, 201.**

9 15. Deutsche Bank moved to dismiss the First Amended Complaint pursuant to Federal Rule
10 of Civil Procedure 12(b)(6) as made applicable to the adversary proceeding by Federal Rule of
11 Bankruptcy Procedure 7012. (**AP Dckt. No. 150**) On February 16, 2012, Judge Sargis issued a
12 Memorandum Opinion and Order dismissing all causes of action in the First Amended Complaint
13 except the Ninth Cause of Action for wrongful foreclosure and the Tenth Cause of Action for quiet
14 title. (**AP Dckt. Nos. 221 and 222**) A copy of the Memorandum Opinion and Decision at (**AP**
15 **Dckt. Nos. 221**).

16 16. Within the dismissed causes of action was Macklin’s TILA Rescission action.

17 17. Mr. Macklin moved for summary judgment on February 21, 2013. (**AP Dckt. No. 307**)
18 Deutsche Bank (“DBNTC”) opposed Mr. Macklin’s motion and requested that summary judgment
19 be entered in its favor on the Ninth Cause of Action for wrongful foreclosure and the Tenth Cause
20 of Action for quiet title, pursuant to Federal Rule of Civil Procedure 56, subdivision (f)(1). (**AP**
21 **Dckt. No. 314**) After a hearing on the summary judgment motion, the Court granted summary
22 judgment for Deutsche Bank and against Plaintiff. A copy of the order granting summary
23 judgment is at (**AP Dckt. No. 327**). The Court entered judgment for Deutsche Bank and against
24 Mr. Macklin on July 2, 2013. A copy of the Judgment is at (**AP Dckt. No. 349**). Mr. Macklin filed
25 a motion to vacate the summary judgment on June 20, 2013. (**AP Dckt. No. 338**) The Court
26 denied that motion on July 29, 2013. (**AP Dckt. No. 357**).

27 18. On October 4th, 2012, Plaintiff moved the court to amend his Adversary Complaint and in
28 the court’s ruling on the Motion the court stated:

1 “The Plaintiff argues that under 11 USC § 1635, the Plaintiff has an absolute
2 right to rescind for TILA violations. Plaintiff asserts only notice to the lender is
3 required to effect rescission. The court finds the Plaintiff was entitled to send a
4 notice of his intent to rescind, however, the court finds the time to litigate the
5 validity of the rescission has passed.”(Emph mine) “The court follows the
6 controlling 9th Circuit finding the one-year statute of limitations began when the
7 lender made clear its intention not to unwind the transaction in the March 31,
8 2009 letter from Roup & Associates.” “In the alternative, the court finds that the
9 Plaintiff’s Notice of Rescission was not proper notice of rescission because it
10 did not offer to tender the loan principal. (Emph. mine) 12 CFR §§
11 1026.15(d)(3), 1026.23(d)(3). As such, the Plaintiff’s right to assert TILA
12 violations would have expired at the later of 3 years or sale of the property, which
13 occurred on December 19, 2009.”

14 19. Plaintiff’s cause of action under TILA Rescission was dismissed by the court under this
15 exact ruling.

16 20. On July 16th, 2014, the case of *Merritt v. Countrywide* (**Exhibit 2, RFJN**) was decided by
17 the Ninth Circuit. In the decision by the court, it was held that there **never has been a requirement**
18 **of tender** under the TILA requirements and that, in fact, the only requirement for effective
19 rescission was notice, which the court in the bankruptcy AP case has stated unequivocally that
20 Macklin exercised his right to rescind by notice. However, the bankruptcy court imposed an error
21 of law when it stated that a one year statute of limitations began to run when the lender refused to
22 “unwind the transaction” and Macklin failed to tender. The tender requirement imposed by the
23 Court in that case was error of law under TILA, as held under *Merritt, id.* Therefore, all Orders
24 and Judgments in **this** case, and in reliance on the bankruptcy case, that are in conflict with *Merritt*
25 must be vacated.

26 21. On January 13th, 2015, the Supreme Court of the United States issued a landmark decision
27 in *Jesinoski v. Countrywide Home Loans* (**Plaintiff’s RFJN Exhibit 1**). In this unanimous
28

1 decision, Justice Scalia, in his delivery of the opinion of the court, stated clearly and
2 unambiguously:

3 “A borrower exercising his right to rescind under the Act need only
4 provide written notice to his lender within the 3 year period, not file
5 suit within that period. Section 1635(a)’s unequivocal terms—a
6 borrower ‘shall have the right to rescind’... by notifying the
7 creditor... of his intention to do so’ (emphasis added)—leave no
8 doubt that rescission is effected when the borrower notifies the
9 creditor of his intention to rescind. And the fact that the Act modified
10 the common law condition precedent to rescission at law, see sec.
11 1635(b), hardly implies that the Act thereby codified rescission in
12 equity.”(Emph. mine)

13 14 **PLAINTIFF IS ENTITLED TO RELIEF**

15 22. Under the existing laws as defined and described above by both the Ninth Circuit and the
16 U.S. Supreme Court, Plaintiff Macklin has evidenced an undeniable right to relief. Fed. R. Civ.
17 Procedure Rule 60 (b) grants Plaintiff here with an absolute right to relief from any judgment or
18 Order that conflicts with both the 9th Circuit and the U.S. Supreme Court’s recent decisions
19 regarding the proper interpretation of the existing laws under TILA as they existed at the time of
20 the previous Findings and Recommendations and Orders of this court.

21 23. The court must vacate its Order based on the facts in evidence in this case. Plaintiff has
22 proven that a tremendous injustice and misapplication of existing law has occurred in the court’s
23 Orders.

24 24. It is clear from the court’s previous Rulings (§17 above) that the court dismissed Plaintiff’s
25 rights under TILA for **both** reasons of tender and timeliness of filing suit under the Act. These
26 decisions were an error of law concerning rights that existed for the benefit of Plaintiff.

27 25. Under the plain reasoning of both *Jesinoski* and *Merritt*, it is without a doubt that Plaintiff
28 rescinded his loan timely and, that as of March 3rd, 2009, there has been no secured debt on

1 beneficial interest from which Defendant DBNTC may have acquired any standing, or rights, as
2 they may relate to the rescinded loan. This is *Res Judicata*. All defenses are time-barred.

3 26. On March 3rd, 2009, exactly 21 days after the lender received the rescission from Macklin,
4 an equitable estoppel was effected against Defendant DBNTC from any act in furtherance of the
5 terms of the deed of trust...the deed was null and void on that date as a result of the Lender failing
6 to comply with existing laws under TILA. *Jesinoski*.

7 27. Because the loan was void on March 3rd, 2009, Defendant DBNTC proceeded against
8 Plaintiff's rights without any authority whatsoever, causing extreme prejudice, harm, loss and
9 damages to his personal and professional life. His home was taken from him by an illegal process.
10 TILA was enacted specifically to protect consumers from the acts of Defendant DBNTC. Plaintiff
11 is entitled to those protections and the court has a duty to uphold those rights vigilantly.

12 28. In Plaintiff's bankruptcy court **FAC (AP)** at pg. 7, par. 18: "after many certified letters to
13 the alleged authoritative parties, **Plaintiff rescinded his loan transaction timely and in writing,**
14 to the lender, servicer, and counsel retained..." Plaintiff unambiguously factually pled the
15 rescission and brought unrefuted evidence of the rescission, which the court has acknowledged as
16 being proper and timely.

17 29. The loan had been rescinded, yet, Defendant here did nothing to mitigate its own damages.
18 Instead, Defendant's counsel, Ron Roup, argued with and intimidated Plaintiff Macklin.

19 30. The court, however, presumed the validity of the contract and failed to recognize that the
20 rescission was ***perfected*** by Macklin on March 3rd, 2009 in its ruling on Plaintiff's MSJ on May
21 24th, 2013, stating that "The dispute before the court....relates to a non-judicial foreclosure
22 sale...and the rights and interests arising from that sale". (**AP, Pg. 1, ln. 26, Mem. Opin. & Dec.**).
23 This is reversible error by the court. **The entirety of Defendant DBNTC's interest is**
24 **extinguished under these two landmark decisions, which govern existing law that was firmly**
25 **in place when Plaintiff introduced his Complaint(s) in this court.** Plaintiff is entitled to the
26 protections and firm resolve that this court must show by vacating its previous Orders as they have
27 prejudiced Plaintiff's rights.
28

31. After a thorough examination of the record in all three Memorandum Decisions and Opinions in the Adversary Proceeding (BK), it is irrefutable that *this* court substantially relied on its improper interpretation of TILA, pursuant to *Jesinoski* and *Merritt*, and dismissed causes of action against Macklin. The entirety of the record in both cases conflicts with the Supreme Court's decision in *Jesinoski* and the *Merritt* decision in the 9th Circuit. The Orders must be vacated.

32. In reviewing a district court's decision for clear error, our court of appeals will find clear error only upon "a definite and firm conviction that a mistake has been committed." *United States v. Ruiz—Gaxiola*, 623 F.3d 684, 693 (9th Cir.2010). If a court "got the law right" and "did not clearly err in its factual determinations," then clear error was not committed—even if another reasonable judicial body "would have arrived at a different result." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011). Plaintiff asserts that the court did not "get the law right" as it existed in this case and as it stands in *stare decisis* under *Merritt* and *Jesinoski*, *id.* Clear error has been committed.

33. 23. In *In re Lenox*, 902 F.2d 737, 740 (9th Cir.1990), the court indicated that Rule 60(b) "does not prohibit a bankruptcy judge from reviewing, sua sponte, a previous order.... And although FRCP 60(b) refers to relief from final orders, it does not restrict the bankruptcy court's power to reconsider any of its previous orders when equity so requires." *Id.* at 739. Equity requires such a form of relief in this case. Macklin's loan was properly rescinded, but his real property and equity was taken from him by improper process.

34. In *Simer v. Rios*, 661 F.2d 655 (7th Cir.1981), for example, the Seventh Circuit refused to decide whether intervenors could bring a Rule 60(b) motion, concluding that it was within the district court's power under Rule 60(b)(4) to vacate a judgment that was void *because it was obtained in a violation of procedural due process*. *Id.* at 663 n. 18. (Emph added). Plaintiff's procedural due process under TILA was violated. The Orders of this court are void.

35. The catch-all provision, Rule 60(b)(6), has been invoked to relieve a party of a final judgment in "extraordinary circumstances." This case warrants extraordinary circumstances.

CONCLUSION

For all of the reasons herein, and in the interests of justice, Plaintiff asks this court for relief from all Orders, Decisions, Judgments or Proceedings that were executed by this court under Rule 60 (b) (1) [Mistake, etc]; (4) [the judgment is void *and* violated due process under *Jesinoski* and *Merritt, id.*]; (5) [applying prospectively the Order/Judgment is no longer equitable]; and (6) [any other reason that justifies relief].

Because the rescission was perfected in 2009, a year prior to the filed Chapter 13 (converted to Chapter 7), and Plaintiff and this court relied on the BK court's improper interpretation of TILA throughout the entirety of the proceedings, Plaintiff shall be required to list the asset (real property) as unencumbered with approximately \$130,000.00 due and payable to him by the assignee of the debt, Deutsche Bank National Trust Co., as trustee for the Accredited Mortgage Loan Trust 2006-2 series certificate-holders. If not for the actions of Defendant DBNTC, the Bankruptcy would never have been filed by Plaintiff in this case.

Plaintiff respectfully asks this court to declare all Orders of this court void by reason of the undisputed facts contained herein.

Respectfully Submitted,

Dated: January 22, 2015

Charles T. Marshall, Esq.

By: /s/ Charles T. Marshall
Attorney for James Macklin